SUPREME COURT, U. S.

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JOHN F. DAVIS, CLE

No. 39

In the Supreme Court of the United States

OCTOBER TERM, 1967

HANK AVERY, PETITIONER

v.

MIDLAND COUNTY, TEXAS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Texas (R. 141) are reported at 406 S.W. 2d 422. The opinion of the Texas Court of Civil Appeals (R. 134) is reported at 397 S.W. 2d 919. The prior findings and judgment of the Midland County District Court (R. 130) are unreported.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on July 13, 1966. Petitioner's timely motion for rehearing was overruled without written opinion on October 12, 1966. The petition for writ of certiorari was filed on January 10, 1967, and was granted

on June 12, 1967 (388 U.S. 905). The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> * * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

Article V, Section 18, and Article VIII, Section 18, of the Texas Constitution, along with other State constitutional provisions of less immediate relevance, are set out in the Appendix to petitioner's brief (pp. 2–6). Similarly, the relevant provisions of various articles of Vernon's Annotated Civil Statutes of Texas are contained in the Appendix to petitioner's brief (pp. 6–41), and thus are not reproduced in the instant brief.[2]

QUESTION PRESENTED

Whether the equal-population principle enunciated in *Reynolds* v. *Sims,* 377 U.S. 533, and other cases involving State legislative apportionment, is applicable as well to the district-based election of members of the

[1] Arguably, this Court's appellate jurisdiction could also have been invoked under 28 U.S.C. 1257(2)—although it might be questioned whether the validity of a State statute was drawn into question in the proceedings below.

[2] Those statutory provisions set out in the Appendix to petitioner's brief comprise the basic legislation relating to the powers, duties and functions of Commissioners Courts in Texas. Additional provisions, not as directly pertinent, are referred to at various points in the instant brief.

governing bodies of local units of government, such as the county here involved.

INTEREST OF THE UNITED STATES

At the last Term, the United States participated as *amicus curiae* in four cases involving the applicability of the equal-population principle to local units of government. *Sailors* v. *Board of Education of the County of Kent,* 387 U.S. 105; *Moody* v. *Flowers* (together with *Board of Supervisors of Suffolk County* v. *Bianchi*), 387 U.S. 97, and *Dusch* v. *Davis,* 387 U.S. 112. That, in turn, was consistent with the government's earlier role in cases such as *Baker* v. *Carr,* 369 U.S. 186, and *Reynolds* v. *Sims,* 377 U.S. 533, and was prompted by the importance of the fundamental right involved—the right of each citizen to full and fair participation in government, at all levels, on an equal basis. Because the basic constitutional question was not resolved by the decisions of last Term and is raised again in the instant case, we continue to assert the public interest—and that of millions of American citizens—in fair representation at the local governmental level.

STATEMENT

The governing body for Texas counties is called the Commissioners Court.[3] That body, in each Texas

[3] As pointed out by the Texas Supreme Court in its opinion in the instant case (R. 145), the name "Commissioners Court" is "a misnomer in the accepted meaning of the designation," and is but a remnant of historical development, since such bodies, as currently constituted, have no duties commonly denominated as judicial in nature. Cf. Interpretive Commentary, Vernon's Ann. Tex. Const. Art. V, Sec. 18; Comment, 11 Tex. L.Rev. 518 (1933).

county, is composed of five members: the County Judge—who is elected in a countywide election and, in addition to his regular judicial duties, serves *ex officio* as the presiding officer of the Commissioners Court[4]—and four commissioners, one elected from each of the four precincts into which the county is divided. That division is made by Commissioners Court itself. Each commissioner is elected by the qualified voters in the particular prescribed precinct which he represents.[5]

Article V, Section 18, of the Texas Constitution provides that a "County Commissioners Court * * * shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of this State * * *." The constitutional and statutory provisions delineating the major functions and powers of such bodies are set out in considerable detail in the Appendix to petitioner's brief (pp. 2–41). A summary of these functions and powers is contained in the Interpretive Commentary accompanying Article V, Section 18, of Vernon's Annotated Texas Constitution, which states:

> The county commissioners court * * * is the general governing body of the county. It establishes a courthouse and jail, appoints numerous minor officials such as the county health officer,

[4] The County Judge votes only in cases of a tie vote among the four commissioners (R. 60).

[5] Vernon's Ann. Tex. Const. Art. V, Sec. 18. That section further provides that county commissioners shall be elected for four-year terms. Compare Vernon's Ann. Civ. Stat. Art. 2339.

fills vacancies in the county offices, lets contracts in the name of the county, builds roads and bridges, administers the county's public welfare services, performs numerous duties in regard to elections, sets the county tax rate, issues bonds, adopts the county budget, and serves as the board of equalization for tax assessments.[6]

In addition to these more important powers and functions, the governing boards of Texas counties have specific authority to build, purchase and maintain all county buildings, including a county hospital;[7] to establish, direct and make appropriations for a Child Welfare Board;[8] to appropriate money for public health and sanitation;[9] to create regional public housing authorities;[10] to create and control parks and recreational facilities;[11] to hold and dispose of all lands granted to the county for educational purposes;[12] to establish free libraries;[13] to exercise the power of eminent domain;[14] and to change the boundaries of in-

[6] Statutory authorization for the performance of the eleven listed functions is contained in the following articles, respectively, of Vernon's Ann. Civ. Stat.: 2351—2688, 4423, 4478, 6743 and 6869d—2355—2351—2351 and 2356—695a, 4418f, 4436a-1 and 4478—2.01-2.04 and 3.01 of the Election Code—2352 and 2354—718 and 719—689a-11 and 1666—7345d. Article VIII, Sec. 18, of the Constitution also provides for the last of the specified functions.

[7] Vernon's Ann. Civ. Stat. Art. 2351, 2370, 2370b, 4478, 4492.

[8] Vernon's Ann. Civ. Stat. Art. 695a.

[9] Vernon's Ann. Civ. Stat. Art. 4418f.

[10] Vernon's Ann. Civ. Stat. Art. 1269k, Sec. 23a.

[11] Vernon's Ann. Civ. Stat. Art. 1015c, 6078, 6081f.

[12] Vernon's Ann. Tex. Const. Art. VII, Sec. 6.

[13] Vernon's Ann. Civ. Stat. Art. 1677.

[14] Vernon's Ann. Civ. Stat. Art. 3264a.

dependent school districts in "the public good."[15] They are also charged with dividing the county into precincts for the election of the commissioners, justices of the peace and constables.[16] However, the only directive or guidance provided by State law for the drawing of precinct lines is that they be drawn "for the convenience of the people."

With respect to the Commissioners Court's duty to function as the board of tax equalization, the commentary accompanying Article VIII, Section 18, of Vernon's Annotated Texas Constitution states as follows:

> The board is charged with the inspection, correction, equalization, and approval of assessments. This mandate makes the board an essential cog in the machinery of assessment * * *. There is no state equalization agency.

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[15] Vernon's Ann. Civ. Stat. Art. 2766. The powers and functions enumerated above are not, in the case of Midland County, Texas, idle or hypothetical. Without purporting to exhaust the list of powers actually exercised, members of the defendant Commissioners Court testified that that body set the *ad valorem* tax rate for all county property (R. 60, 97), adopted the county budget (R. 59, 97), authorized the sale and issuance of bonds (R. 97), let contracts for public works (*ibid.*), set the salaries of all elected officials (R. 59), called elections and canvassed the results (98–99), bought all county equipment (R. 59, 97), expended tax funds (R. 59, 62, 97) and functioned as the board of tax equalization (R. 60). Moreover, the commissioners recognized that, in carrying out these functions, they represented all the people in the county, not just those residing in certain areas (R. 53, 106).

[16] Vernon's Ann. Tex. Const. Art. V, Sec. 18; see also Vernon's Ann. Civ. Stat. Art. 2339.

> In essence, the board is responsible for the assessor's work and is given considerable power in carrying out this responsibility * * *.[17]

The fact that the Commissioners Courts are endowed with an expansive jurisdiction and exercise substantial and diverse powers which significantly affect and are vitally important to the citizens and residents of all parts of Texas has not gone unrecognized by the State courts. In *Ehlinger* v. *Clark*, 8 S.W.2d 666, 674, the Supreme Court of Texas stated:

> [V]arious articles of the statutes show that the county commissioners' court is the active governing body of the county, with a jurisdiction that touches in some respect almost every feature of the county's business.[18]

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[17] Interpretive Commentary, Vernon's Ann. Tex. Const. Art. VIII, Sec. 18. The commentary notes that a 1938 statewide tax survey revealed "almost a universal custom" of arbitrarily dividing the State into sections and arbitrarily affixing different tax rates, without regard to permanent improvements, proximity to markets, accessibility to modern conveniences and other important considerations.

[18] The same court, in *Pritchard & Abbott* v. *McKenna*, 350 S.W.2d 333, 335, stated that the law places a heavy responsibility on the Commissioners Court when it functions as the board of tax equalization and "of necessity, it must be given considerable power to carry out this responsibility."

In addition, the Texas Court of Civil Appeals has ruled that the term "county business" in Art. V, Sec. 18, of the Texas Constitution should be given a broad and liberal construction so as not to defeat the "real purpose" of that provision (*Rodgers* v. *Taylor County*, 368 S.W.2d 794, 796), and has stated that the powers of the Commissioners Courts must be broadly and liberally construed, and encompass the implied authority to do what may be necessary in the exercise of the duties expressly conferred on them (*El Paso County* v. *Elam*, 106 S.W.2d 393, 395).

Petitioner, a taxpayer and registered voter of Midland County and a resident of Commissioners' Precinct No. 1, brought this action "individually and on behalf of other persons similarly situated," in the Midland County District Court (R. 1). Named as defendants were the Commissioners Court and each of its members (R. 2).

The complaint, originally filed on December 12, 1962, and finally amended as of April 30, 1964 (R. 1–16), alleged that the present division of the county into commissioners' precincts violates the Fourteenth Amendment because of the gross disparity in the distribution of the population among the four precincts.[19] The precincts currently in use were adopted by the Commissioners Court, after public hearings, on August 31, 1963, and became effective on January 1, 1964 (R. 6–7).[20] Before instituting this action in 1962, and again in August 1963, petitioner had requested that the commissioners redistrict the county so as to establish equally populated precincts, but was unsuccessful on each occasion (R. 5–6).

More specifically, petitioner's complaint asserted that a majority of the commissioners are "elected by and answerable to less than 3% of the qualified voters

[19] Petitioner also attacked the validity of the districting arrangement as violative of certain provisions of the Texas Constitution (see R. 11–12).

[20] This was the first adjustment made in the precinct boundaries since 1908 (R. 2, 4). However, the changes made were only very minor insofar as they affected the distribution of population among the four precincts, and retained approximately the same gross disparities from a population basis as had existed previously (see R. 7–11).

of Midland County" (R. 11), and charged that, "[b]ecause great disparity in population and qualified voters among the Commissioners' precincts exists," those residing in Precinct No. 1—over 97 percent of the county's population—are "subjected to invidious and unjust discrimination," and have their voice as citizens "diluted" and their votes "debased" in effect (R. 13). Petitioner contended that the pertinent provisions of the federal and State constitutions required a division of the county "into Commissioners' precincts having as nearly as possible and practicable an equal number of people and qualified voters" (R. 12).[21] Finally, the complaint sought a variety of forms of relief, some in the alternative, directed toward correcting the existing disparity which existed among the prescribed districts (R. 13–15).

Midland County is situated in west central Texas. It has but one densely populated area, the City of Midland, which is surrounded by very sparsely populated rural areas.[22] Upwards of 90 percent of the

[21] Petitioner also charged that the members of the Commissioners Court, "acting as the Board of Equalization of Midland County have and will continue to value for State and County tax purposes all taxable property in Commissioners' precincts No. 2, No. 3, and No. 4 at an average of approximately 8% of its fair market value and all taxable property in Commissioner's precinct No. 1 at an average of approximately 18% of its fair market value," and that this constituted "arbitrary and unlawful action" resulting from an "abuse of discretion" in not dividing the county into equally populated election precincts (R. 11).

[22] Indeed, Midland is and has been "the only incorporated city, town, or village in Midland County, Texas" (R. 3).

population of the county lives in the urban center which, under the present districting plan, lies entirely within Commissioners' Precinct No. 1 (R. 5).[23] According to the 1960 census, Midland County had a population of 67,717, which was distributed among the four precincts, under the plan then in effect, as follows: No. 1 had 66,225, or 97.8 percent; No. 2, 298, or .44 percent; No. 3, 414, or .61 percent; and No. 4, 780, or 1.15 percent (R. 4).[24] The estimated 1963 county population was about 70,000 and was distributed, under the revised plan adopted on August 31, 1963, as follows: No. 1 had 97.01 percent; No. 2, 1.22 percent; No. 3, .59 percent; and No. 4, 1.18 percent (R. 8).[25] Under this plan, currently in effect, about 3 percent of the county's residents are represented by a majority of the body's members, and three of the four elected commissioners are chosen by 2.6 percent of the qualified voters. Conversely, those living in Precinct No. 1—97 percent of the population and the qualified voters of the county—are represented by and elect only one of the four commissioners. The

[23] The percentage of the county's total population living in the City of Midland has been consistently increasing over the years (see R. 3–4).

[24] Qualified voters, both before and after the 1963 modification of the precinct lines, were distributed among the four districts in substantially identical proportions (see R. 8–9).

[25] The complaint also alleged that other factors such as land area and assessed valuation of property similarly were grossly disproportionate among the four precincts (R. 9–10). We do not discuss these factors at length, since the overriding constitutional consideration, in our view, is whether the prescribed districts are substantially equal in population, although equal distribution of such other factors may of course be both desirable and equitable.

maximum population-variance ratio, under the revised plan, is about 164 to 1 (see R. 8); under the prior plan, it was over over 220 to 1 (see R. 4).

Three of the four commissioners testified at the trial in the Midland County District Court. Commissioner Moreland, from Precinct No. 3, stated that population was not an important factor in drawing the precinct lines (R. 80). Although Commissioner Osborne, of Precinct No. 4, testified that he considered population before voting for the adoption of the revised districting plan, he was unable to tell the court, even approximately, the distribution of population among districts (R. 102–106), and flatly stated that the commissioners "don't run the county according to population" (R. 90). Commissioner Bryant,[26] from Precinct No. 2, not only stated that population was not a major factor, but also declared that there ought to be a majority of rural representation on the county board, because all of the officials elected countywide resided in the City of Midland (R. 118–119, 125–126). He stated that the only way to assure the election of rural commissioners was by drawing the precinct lines in a way which would place all of the city dwellers in one district (R. 126).[27]

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[26] Since the decision of the Texas Supreme Court, the term of Commissioner Bryant has expired and the new commissioner for Precinct No. 2 is J. C. Brooks, who is participating in these proceedings.

[27] Commissioner Moreland explained that population was not an important factor since "the City of Midland has the city council and the mayor to run its business * * * and we have a whole county to run, and the law of Texas says that each county shall be divided into four precincts" (R. 81), and stated

At the conclusion of the trial, the district court entered its findings and judgment (R. 130–133). It found that over 95 percent of the population and over 97 percent of the qualified voters of Midland County resided in Precinct No. 1, and that "other pertinent factors, such as land area and taxable values * * * were grossly disproportionate" among the commissioners' precincts (R. 131).[28] The trial court fur-

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that the city dwellers were trying to take over control of county affairs, while, in his view, the existing arrangement "better serve[d] the people" (R. 82–83). Commissioner Osborne stated that, if the county board were apportioned on a population basis, he did not believe that any resident of the rural areas could be elected a commissioner (R. 108; see R. 126), and referred to himself as one of "the three rural commissioners" (R. 121). Thus, it seems clear that three of the four voting members of the Commissioners Court sought to district the county so as to maintain rural control and prevent the residents of the City of Midland from having more than one representative on the board.

An attempt was made to show that the districting scheme was designed to serve other purposes—*viz.*, rendering a potential racial-bloc vote impotent by avoiding the concentration of almost all Negroes in one equally populated district, and instead locating them in the one grossly overpopulated precinct where their vote is substantially diluted (R. 83–87), preservation of a "dry" precinct (R. 86), and manipulation of property tax rates (R. 68–72). However, these inquiries were inconclusive, and seem neither to establish nor refute the possibility that such factors influenced the districting arrangement.

[28] In addition, the court found that the August 31, 1963, modification "made only insignificant changes in the Commissioners' precincts as they existed" prior to that time (R. 131), and that the county "could have been divided into Commissioners' precincts on a basis or plan taking into proper account population, member of qualified voters, land area, taxable values, and other pertinent factors, which would have been and which would be practical and for the convenience of the people" (*ibid.*).

ther found that the defendant commissioners did not give "due and proper consideration" to the pertinent factors in devising the challenged districting plan, but rather acted out of "political expediency, to maintain the status quo, and to insure that the rural areas * * * would continue to elect a majority of the members of the Commissioners' Court" (R. 132). Having determined that there was no evidence to support or justify the existing division of the county into precincts, and that the plan was not for "the convenience of the people,"[29] the trial court concluded that the defendants had "acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully, and in gross abuse of their discretion, and that such action constituted invidious discrimination" (R. 132).[30]

Upon the basis of these findings, the district court decreed that the districting plan of August 31, 1963, and all prior plans be set aside, and ordered the defendant commissioners to adopt a new plan in which

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[29] That language is taken directly from Art. V, Sec. 18, of the Texas Constitution (see Pet. Br. App. 2).

[30] Although the trial court made no explicit reference to the Equal Protection Clause of the federal Constitution, it clearly appears that its holding was based on federal as well as State constitutional grounds. That seems plain since the complaint was grounded squarely on the Fourteenth Amendment as well as the Texas Constitution, and is confirmed by the court's finding of "invidious discrimination" (see, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 561), a traditional Equal Protection Clause concept, especially in the instant context. And both of the State appellate courts viewed the district court's decision as having been grounded, at least in part, on a federal constitutional basis (see R. 135–137, as to the Court of Civil Appeals; R. 144, 150, as to the Supreme Court).

each precinct "will have substantially the same number of people" (R. 133).

On appeal, the Texas Court of Civil Appeals reversed the judgment of the trial court and, without remanding, entered judgment for the defendants (R. 134–140). That court confined itself to the issue whether the Commissioners Court was under any obligation, under federal or State law, to establish precincts substantially equal in population.[31] Concluding that no such obligation exists, since "there is no law or constitutional requirement" as to population-based districting for Texas county boards, the appellate court held that the district court had no authority to enter its decree and that no useful purpose would be served by a remand (R. 140).

On Writ of Error to the Supreme Court of Texas, the judgment was again reversed.[32] Relying on *Baker* v. *Carr,* 369 U.S. 186, and two cases decided by Texas state courts, the Supreme Court held that petitioner had a justiciable interest in the cause (R. 144). The court then indicated its agreement with the district court's conclusion that the existing districting plan was not supportable under State and federal constitutional requirements "for the reasons stated by the

[31] In the course of its opinion the court noted that petitioner had invoked "the jurisdiction of the district court under its supervisory control of county commissioners' courts as provided in Article V, § 8 of the Texas Constitution" (R. 135).

[32] One judge dissented on the ground that the trial court's judgment was limited to requiring a redistricting based solely on population, a matter which had been decided correctly by the Court of Civil Appeals, and also because, in his view, petitioner lacked proper standing to challenge the existing districting scheme (R. 151–159).

trial court in its judgment findings" (*ibid.*). However, the court did not agree with the trial court that precincts must be drawn on an equal-population basis. Stating that recent developments had narrowed the major responsibilities of the Commissioners Courts to nonurban areas, and that "[t]he voice of the rural areas will be lost for all practical purposes" if the equal-population principle were applied to the election of commissioners, the court held that the requirement of the Texas Constitution that precincts be drawn for the "convenience of the people" warranted consideration of such factors as qualified voters, land area, geography, miles of county roads and taxable values (R. 149–150).[33] However, considering primarily the "convenience of the people" requirement of Art. V, Sec. 18, along with the equal rights clause of Art. I, Sec. 3, the Texas Supreme Court found "obvious arbitrariness" in the plan under attack because of the "patent malapportionment" which it involved (R. 150).

Although the Supreme Court reversed and remanded the cause to the trial court, the discretion of

[33] In so holding, the Texas Supreme Court plainly concluded that the federal Constitution's Equal Protection Clause does "not require a commissioner's precinct division of Texas counties" solely upon a population basis "in all cases * * *" (R. 150). Earlier it had stated that "there may be circumstances under which equality in population of political subdivisions electing representatives to an overall governing body is essential to equality in voting rights," but that "in the particular circumstances of a [Texas] county" there was a constitutional justification for "a rational variance from equality in population in commissioners precincts upon the basis of additional relevant factors * * *" (R. 149).

the lower court on remand was severely limited, for the reviewing court stated (R. 150): "[N]either this Court nor the district court has the power to redistrict Midland County into commissioners precincts. This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate." In the precise language of the Texas Supreme Court, its judgment ordered the cause remanded to the trial court solely "for the entry of judgment in accordance with this opinion * * *" (R. 160).

INTRODUCTION AND SUMMARY

Involved in this case is the same basic constitutional question which was presented to the Court for decision, but left unresolved, in the four local government cases argued last Term.[34] That question, simply stated, is whether the equal-population principle of *Reynolds* v. *Sims*, 377 U.S. 533, and related cases applies to the district-based election of members of local governmental bodies. In the four cases considered last Term the government, as *amicus curiae*, filed an extensive brief (hereinafter "*Sailors* brief") developing some of the pertinent background and fully discussing the arguments which, in our view, support the application of the *Reynolds* principle at the local level. We do not repeat that discussion at length here;[35]

[34] *Moody* v. *Flowers* (together with *Board of Supervisors of Suffolk County* v. *Bianchi*), 387 U.S. 97; *Sailors* v. *Board of Education of the County of Kent*, 387 U.S. 105; *Dusch* v. *Davis*, 387 U.S. 112.

[35] We should like simply to incorporate by reference those parts of the *Sailors* brief which are of continuing relevance. To this end, and for the Court's convenience, additional copies of that brief accompany the instant brief.

rather, we confine ourselves in the main to showing the pertinence of the points developed in the *Sailors* brief to the districting arrangement here at issue—that for the election of members of the county governing board of Midland County, Texas. In the course of that discussion we seek to demonstrate that the judgment of the Texas Supreme Court under review was a final one, so that the exercise of this Court's certiorari jurisdiction is proper; that the *Sailors* and *Dusch* cases, the two local government cases in which the Court reached the merits last Term, are essentially narrow holdings which leave open the broad constitutional question presented in the instant case; and that, even if a distinction along functional lines is drawn, as to the applicability of the equal-population principle at the local level, the nature, functions and powers of governing boards of Texas counties are sufficiently substantial that these bodies should be included within the ambit of the constitutional rule.

Since we rely heavily on the discussion in our *Sailors* brief, a short summary of the essential points made there will provide a useful framework.[36] In the *Sailors* brief we took the basic position that, as a matter of consistent constitutional decision-making, logic and sound policy, the equal-population principle developed in the State legislative apportionment cases is applicable to local governmental bodies whose members are elected from districts. We noted that the Equal Protection Clause applies no less at the local

[36] In addition, references to various parts of that brief which are also pertinent here are included throughout the instant brief.

than at the State level of government (*Sailors* Br. 24–25), and that no prior decision of this Court has held the equal-population principle inapplicable at the local level (*id.* at 26–29). We asserted that no meaningful distinctions can be drawn between State legislatures and local governmental bodies insofar as the basic constitutional principle laid down in *Reynolds* v. *Sims* is concerned. That position was grounded both on the broad language used by the Court in its opinion in *Reynolds*, and on the basic approach and rationale adopted by the Court in that case—that a citizen's right to vote is unconstitutionally impaired when the weight of that vote differs significantly from that of those residing elsewhere within the same jurisdiction (*id.* at 29–41). We pointed out that the trend of authority in the State and lower federal courts overwhelmingly supports application of *Reynolds'* equal-population principle to local governmental bodies, and we discussed many of the cases in this regard (*id.* at 41–59).

In addition to these essentially legal arguments, we maintained in the *Sailors* brief that considerations of sound public policy argue for such an application, emphasizing the role of local governments, the damaging effects of malapportionment at the local level, and the important interest of newly enfranchised voters, under the Voting Rights Act of 1965, in fairly apportioned local governmental bodies (*id.* at 63–72). In the course of discussing the four cases then before the Court, we asserted that the equal-population principle certainly should be held applicable to the governing boards of counties and municipalities which are elected from dis-

tricts (*id.* at 73–92). We contended that school boards whose members are elected on a district basis should likewise be governed by that principle (*id.* at 92–101). And, although no such bodies were involved in the four pending cases, we suggested that, in our view, the *Reynolds* principle should be regarded, at least *prima facie,* as applying as well to those various kinds of local government units commonly referred to as special districts, where the governing boards of those units are elected from districts (*id.* at 101–106). Finally, we pointed out that, despite the large number of bodies potentially affected, application of the equal-population principle at the local level would not create an unmanageable problem for the judiciary (*id.* at 107–118).

Against this background, developed fully in the *Sailors* brief, we limit ourselves here to consideration of the reasons which support application of the equal-population principle to the instant districting arrangement. We of course take into account subsequent developments, including the decisions and opinions of the Court in the four cases of last Term, which pertain to the constitutional question here at issue, and certain of the views and approaches which were suggested during the course of oral argument in those cases. Initially, however, we address ourselves to the threshold jurisdictional question which was raised in one of the briefs in opposition to the petition for certiorari in this case.

ARGUMENT

I

THIS COURT'S JURISDICTION IS PROPERLY INVOKED TO REVIEW THE FEDERAL CONSTITUTIONAL QUESTION WHETHER THE EQUAL-POPULATION PRINCIPLE IS APPLICABLE TO THE MIDLAND COUNTY COMMISSIONERS COURT

Because the Texas Supreme Court, while rejecting petitioner's basic federal constitutional claim, nevertheless invalidated the present districting plan for electing the Midland County commissioners, principally on State law grounds, and remanded the case to the trial court, a question has been raised whether the judgment below finally disposes of the federal question so as to be reviewable here under 28 U.S.C. 1257 (see Respondent Commissioners' Brief in Opposition, pp. 4–6). To be sure, the Court's grant of certiorari in the face of this jurisdictional objection constitutes at least a preliminary ruling rejecting that contention. Yet, since that action does not foreclose the question of jurisdiction (*e.g., Jankovich* v. *Toll Road Comm'n,* 379 U.S. 487, 489), we address ourselves to it, mindful that a further postponement in the decision of the fundamental constitutional issue presented here would have unfortunate consequences, perpetuating the uncertainty that now prevails among the lower courts in the wake of this Court's decisions in last Term's cases.[37]

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[37] See note 54, *infra.* The instant decision is, moreover, in conflict with the result reached by the courts of last resort of California, New York, Wisconsin, Minnesota, Maryland, Missouri and South Dakota (see *Sailors* Br. 41–42, n. 46), and

1. It is clear beyond any doubt that the court below reached and decided the issue whether the Commissioners Court must be apportioned on the basis of the equal-population principle of *Reynolds* v. *Sims*, 377 U.S. 533, for the court declared (R. 150):

> We disagree with the judgment of the trial court in its requirement that Midland County be redistricted into commissioners precincts solely upon the basis of population. For the reasons before stated, we are of the opinion that the equal protection of the law clauses of the Texas and the United States Constitutions do not require a commissioners precinct division of Texas counties on this basis in all cases, dependent, of course, in each case upon the existence and effect of other relevant factors * * *.

Properly viewed, this statement is not simply *dicta* but, rather, constitutes a final holding on an issue the resolution of which was plainly vital to the court's disposition of the appeal. That holding—on the federal constitutional issue—is subject to further review only by this Court.

To be sure, as respondents point out (Br. in Opp. 4), the court below held the present districting arrangement violative of the Texas Constitution because of its

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also conflicts with the view of the only federal court of appeals to consider the constitutional issue on the merits. See *Ellis* v. *Mayor and City Council of Baltimore*, 352 F. 8d 123 (C.A. 4) (see also *Sailors* Br. 50–51, and n. 53).

"obvious arbitrariness" (R. 150).[38] But it did not stop there. Appropriately, the court also considered the question of permissible corrective measures to meet the requirements of State and federal law, and in so doing, it expressly authorized the Commissioners Court, when drawing new districts, to consider several factors which would clearly be precluded from consideration if the equal-population principle of *Reynolds* were applied (R. 149–150). Moreover, these factors were related, by the court below, to the convenience of the residents rather than to any federal constitutional requirements. Thus, the opinion of the Supreme Court is a clear statement that the equal-population principle does not apply to a Texas county's governing body.

2. Respondent commissioners also assert, in effect, that the decision below was not final, and therefore not properly reviewable by this Court, because the mandate of the Texas Supreme Court constitutes a general remand, reopening the cause "for a new trial on all issues" (Br. in Opp. 4–5). That suggestion, however, is wholly at odds with the language of the opinion and judgment in the case. Indeed, the order entered on July 13, 1966, states that the cause is remanded "for entry of judgment in accordance with this opinion" (R. 160), and an identical statement ap-

[38] This holding was apparently grounded on the requirement of the Texas Constitution that districts be drawn "for the convenience of the people," considered along with the equal rights clause of the State constitution, rather than on the Fourteenth Amendment to the federal Constitution, although this is admittedly not wholly clear from the court's opinion (see R. 144).

pears in the final paragraph of the court's opinion (R. 151).[39] The plain implication is that all issues have been finally resolved and that the trial court is charged only with entering an appropriate decree—a procedure fully consistent with Texas practice.[40]

Any doubt on this score is resolved, under Texas law, by looking to the opinion itself. See *Wells* v. *Littlefield,* 62 Tex. 28, 32; *Witherspoon* v. *Daviss,* 163 S.W. 700, 703. Here the closing paragraph of the Supreme Court's opinion states that the cause is remanded "for the entry of judgment" (R. 151). And the discussion of the limitations of judicial authority

[39] Thus, the less particularized statement, early in the opinion, to the effect that the court would "reverse the judgments below and remand the case to the trial court for further proceedings" (R. 141), must be understood as qualified by the direction at the close of the opinion and the language of the order actually entered.

[40] Nor are the authorities cited by respondents (Br. in Opp. 5) to the contrary. Rule 503, Texas Rules of Civil Procedure, merely provides that if the Supreme Court of Texas reverses the judgment of a lower court, it may remand the cause for another trial. In *Seydler* v. *Keuper*, 133 S.W. 2d 189, the appellate court, having reversed the judgment of the trial court and ordered the cause "remanded for another trial," merely held that it meant what it said and that at the new trial new allegations could be heard and decided. Similarly, in *First State Bank of Bishop* v. *Grebe*, 162 S.W. 2d 165, a mandate reversing and "remand[ing] to the trial court for further proceedings consistent with this opinion" was held to permit "a new trial on all issues of fact" because the order was "not modified by more specific instructions" (162 S.W. 2d at 169). That ruling is plainly inapplicable in the instant case, since (1) there remain no issues of fact, and (2) the mandate here specifically instructs the trial court to enter a judgment.

in fashioning relief makes clear the very limited nature of the remand (R. 150):

> [N]either this Court nor the district court has the power to redistrict Midland County into commissioners precincts. This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate. * * *

In light of this language in the Supreme Court's opinion, the district court could not, on remand, fashion a revised districting arrangement. At most, it could require the Commissioners Court to submit a plan for redistricting the county in accordance with the criteria stated in the opinion by the Supreme Court.[41] So viewed, the decision below is no less final than a holding on the merits accompanied by a retention of jurisdiction, or a remand to a lower court to do so, for the purpose of entering any further orders, if necessary, to ensure proper compliance with the basic holding by those affected thereby. See, *e.g.*, *Davis* v. *Mann*, 377 U.S. 678, 693.

3. As a matter of Texas practice, the judgment entered here would be viewed as a final one.[42] At all

[41] Retrial of all issues in the district court is thus plainly not contemplated by the mandate, and would be contrary to Texas practice. In addition, in light of the Supreme Court's disposition of petitioner's federal constitutional claims, it would be quite pointless. All of the facts necessary for the adjudication of these claims have already been found and are uncontroverted. No new findings of fact could conceivably change the Texas Supreme Court's view that the equal-population principle does not apply to Texas county boards. See *Spencer* v. *Pettit*, 34 S.W. 2d 798, 801.

[42] In Texas the general rule regarding the finality of judgments rendered by State courts is, in substance, that a final

events, it meets the standards of finality for review by this Court under 28 U.S.C. 1257—a matter as to which the State court's characterization, while relevant, is not controlling. See *Gotthilf* v. *Sills,* 375 U.S. 79, 80; *Department of Banking* v. *Pink,* 317 U.S. 264, 268; *Cole* v. *Violette,* 319 U.S. 581, 582; *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69, 72. Here the judgment below is within the statute under all the relevant precedents, whether the focus is on the fact that "nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate" (*Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62, 68), or on the appellate judgment as reflecting "the final word of a final court" in the State (*Market Street Ry. Co.* v. *Railroad Commission,* 324 U.S. 548, 551).

Of particular relevance here are *Pope* v. *Atlantic Coast Line R. Co.,* 345 U.S. 379, *Mills* v. *Alabama,* 384 U.S. 214, and *Brady* v. *Maryland,* 373 U.S. 83. In each of these cases, although the State appellate court had remanded for further proceedings, this Court held the judgment sufficiently final to permit review under Section 1257. It is enough to quote a pertinent passage from the opinion in the *Mills* case (384 U.S. at 217–218):

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judgment is one that determines the rights of all parties and disposes of all the issues. Application of that general rule in concrete cases makes it clear that, had the Court of Civil Appeals entered the judgment in question, that judgment would be considered final and reviewable by the Texas Supreme Court. See, *e.g., Railroad Commission* v. *Weld,* 66 S.W. 1095; *Hargrove* v. *Insurance Investment Corp.,* 176 S.W. 2d 744, 747; *Ferguson* v. *Ferguson,* 338 S.W. 2d 945, 947.

> * * * *[I]f the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets. * * *[43]

In sum, it is abundantly clear that the judgment of the Texas Supreme Court here challenged is a final one for purposes of this Court's jurisdiction under Section 1257. The plain language of the mandate contemplated nothing more than the entry of judgment by the trial court in accordance with the views stated in the appellate court's opinion, and that opinion definitively resolved petitioner's federal constitutional claims against him, holding that the equal-population principle of *Reynolds* was inapplicable. That ruling is plainly not subject to relitigation upon remand, however the Texas court's mandate is read. Thus, the judgment below, at least as to the federal

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[43] For a general discussion of the relevant criteria in determining the finality of State court decisions, see Dyk, *Supreme Court Review of Interlocutory State-Court Decisions: "The Twilight Zone of Finality"*, 19 Stan. L. Rev. 907, 934–943 (1967).

constitutional question on which this Court's jurisdiction is necessarily grounded, is a final one and is reviewable presently by this Court.

II

NONE OF THE LOCAL GOVERNMENT CASES DECIDED LAST TERM RESOLVE THE CONSTITUTIONAL QUESTION HERE AT ISSUE

There can be no serious contention that the Court's decisions in the four local government cases argued last Term expressly or impliedly resolved the basic constitutional question involved in the instant case—whether the equal-population principle of *Reynolds* applies to local governmental bodies whose members are elected from districts. That is, of course, self-evident with respect to the cases involving county governing boards—*Moody* and *Bianchi*—which the Court disposed of solely on jurisdictional grounds.[44] Indeed, in the course of its *Moody-Bianchi* opinion, the Court

[44] In *Moody* and *Bianchi* the Court concluded that three-judge courts had been improperly convened, since State statutes of general application were not challenged in those cases, and that therefore it lacked jurisdiction on direct appeal (387 U.S. at 104). Thus, the judgments in those cases were vacated and the causes remanded to the district courts for the entry of a fresh decree to permit the perfection of a timely appeal to the appropriate court of appeals. In *Bianchi*, upon remand, the district court dismissed the action, concluding that *Reynolds* was inapplicable at the local level, a holding contrary to the unanimous view of the three-judge court which had decided the case previously. *Bianchi* is now before this Court again, on petition for certiorari before judgment in the court of appeals, as No. 591, this Term, and the government has filed a memorandum suggesting that certiorari be granted and the case scheduled for argument with the instant case.

specifically stated that it "indicate[d] no views on the merits" of the controversies there involved (387 U.S. at 102).[45] Nor was the broad constitutional question here presented reached in either of the two cases decided on the merits—*Sailors* and *Dusch*.[46]

As to *Sailors*, the essence of the Court's extremely narrow holding in that case is that there is no constitutional inhibition on an arrangement involving the *appointment*, as distinguished from the election, of members of a local governmental body exercising *administrative*, as differentiated from legislative, functions. In distinguishing *Reynolds* and cases such as *Gray* v. *Sanders*, 372 U.S. 368, and *Wesberry* v. *Sanders*, 376 U.S. 1, the Court pointed out that "[t]hey were all cases where elections had been provided and cast no light on when a State must provide for the election of local officials" (387 U.S. at 108).

[45] See also the *Sailors* opinion, reserving the broader constitutional issues raised for cases such as *Bianchi*, which, the Court expressly noted, it had "disposed of on jurisdictional grounds" (387 U.S. at 110). Recognition of the jurisdictional problem in *Moody* and *Bianchi*—otherwise better vehicles for a broad-based consideration of the constitutional issues than *Sailors* and *Dusch*—led the government to support the granting of certiorari in the instant case and to suggest that it be set down for argument with the other cases. See Memorandum for the United States as *Amicus Curiae* in *Avery* v. *Midland County, Texas*, No. 958, 1966 Term, p. 6, n. 7.

[46] While the government argued that *Sailors* and *Dusch* presented the broad constitutional question, the Court focused on unique features of those cases and the schemes there challenged, and decided the cases on those grounds, thus obviating any necessity for deciding that question. In short, the Court simply concluded that the equal-population principle, assuming its applicability at the local level generally, did not invalidate the particular arrangements at issue in those cases.

In the *Sailors* opinion the Court noted that, even were it to "assume *arguendo* that where a State provides for an election of a local official or agency, the requirements of *Gray* v. *Sanders* and *Reynolds* v. *Sims* must be met * * *," that would not answer the question whether, under the Equal Protection Clause, "Michigan may allow its county school boards to be appointed" (*id.* at 109). Having found the "system for selecting members of the county school board" there involved to be "basically appointive rather than elective," the Court deemed it unnecessary to decide "whether a State may constitute a local legislative body through the appointive rather than the elective process," since that county school board "performs essentially administrative functions" which "are not legislative in the classical sense" (*id.* at 109–110). Again, in closing its opinion in *Sailors,* the Court reiterated that its holding was a quite limited one, stating (*id.* at 111), "If we assume *arguendo* that where a State provides for an election of a local official or agency—whether administrative, legislative, or judicial—the requirements of *Gray* v. *Sanders* and *Reynolds* v. *Sims* must be met, no question of that character is presented," and concluded (*ibid.*): "Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy."[47]

[47] To be sure, the Court included in its *Sailors* opinion a quotation from *Reynolds* relating to the non-sovereign status of political subdivisions which several courts have referred to in support of a determination that the equal-population principle

Obviously, therefore, the holding and opinion in *Sailors* have no bearing on the decision in the instant case.[48] Indisputably, the members of the county governing board here involved *are* determined through the elective process; they are not chosen "by the governor, by the legislature, or by some other appointive means rather than by an election" (*id.* at 108). *Sailors* holds no more, in our view, than that the equal-population principle is inapplicable where members of a local

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is inapplicable at the local level (387 U.S. at 107–108). That language is plainly explicable by the context in which it appears in the *Reynolds* opinion—refutation of reliance on the federal analogy (see *Sailors* Br. 34–35, n. 37)—and was, in our view, included in the *Sailors* opinion in connection with the accepted proposition that a State "has vast leeway in the management of its internal affairs" (387 U.S. at 109). As part of the same discussion, the Court stated that "[a] State cannot of course manipulate its political subdivisions so as to defeat a federally protected right * * *" (*id.* at 108), "[n]or can the restraints imposed by the Constitution on the States be circumvented by local bodies to whom the State delegates authority" (*id.* at 108, n. 5). Against this background and in light of express statements that the broad question of applicability was not reached, it can hardly be contended that the inclusion of this quotation implicitly resolved that question.

[48] In *Sailors* the government urged that, even with what we characterized as the two-step election scheme involved in that case, the equal-population principle should be held to apply, since at least an indirect election system was involved (*Sailors* Br. 98–99). But that argument was rejected (see 387 U.S. at 109–110, n. 6), the Court stating that "the membership of the county [school] board is not determined, directly or indirectly, through an election in which the residents of the county participate." That language, and the *Sailors* opinion as a whole, plainly leaves open the question of the applicability of *Reynolds* to school boards whose members are elected from districts. While that question is of course not presented in the instant case, it is assuredly one of continuing importance (see *Sailors* Br. 92–94; see also note 70, *infra*).

body exercising essentially administrative functions are appointed rather than elected. Two questions were explicitly left open for decision in *Sailors*. One of these—whether a local legislative body may be constituted through the appointive rather than the elective process—is rather clearly not involved here.[49] Even if the county governing board of Midland County is not viewed as exercising legislative functions—we submit that it should be so regarded, if that consideration is pertinent (see *infra*, pp. 58–60)—its members are elected and not appointed. On the other hand, the other question left unresolved in *Sailors*—whether the equal-population principle applies where the members of a local governmental body are in fact elected under State law—is of course squarely presented for decision in the instant case.

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[49] Since not presented for decision here, the government takes no position on this question in the instant brief, except to note that our basic approach has assumed that no inhibition exists on States in determining that local officials are to be appointed rather than elected, without regard to whether the bodies on which they serve are legislative or nonlegislative in character. Of course, the constitutional question posed by the Court as to the appointment of local legislative bodies remains an open one, and may be presented for decision in some subsequent case. We should add that, however that question is ultimately resolved, an appointive scheme might in any event be subject to constitutional challenge if the system or process through which the appointment is accomplished is irrational or discriminatory in nature (see *Sailors* Br. 37, 74). Cf. *Fortson* v. *Morris*, 385 U.S. 231, 235. Another aspect of the position previously taken by the government is that at-large elections, where all or some of the members of the body are elected by all of the unit's voters, are constitutionally valid; that view was of course confirmed by the Court's holding in *Dusch* (see *infra*, p. 33).

Nor is *Dusch*—the other case in which the Court reached the merits last Term—of controlling significance, or even direct relevance, here. Again, this Court's opinion makes it clear that its disposition in that case was not based on a resolution of the broad constitutional question. Early in its opinion in *Dusch*, the Court noted that in *Sailors* it had "reserved the question whether the apportionment of municipal or county legislative agencies is governed by *Reynolds* v. *Sims*," and stated that, "though we assume *arguendo* that it is * * *," the decision below was erroneous on the particular facts there involved (387 U.S. at 114). We do not mean to intimate that the Court's *arguendo* assumption in this regard—in both the *Sailors* and *Dusch* opinions—constitutes an implicit determination of the broad constitutional question in favor of applicability. At the least, however, this language plainly shows that neither of these cases is controlling and that the question remains open for decision here.

Like *Sailors, Dusch* involves a rather narrow holding premised on the unusual factual situation there presented.[50] Finding that the so-called 7–4 plan under

[50] In *Dusch* the government maintained that, despite the at-large feature and the analogy to *Fortson* v. *Dorsey*, 379 U.S. 433, the Court should hold the 7–4 plan there involved invalid. That position was grounded on the consideration that, while all council members were elected at large, the range of choice of candidates was significantly affected by the residence district requirement, where, as there, the residence districts prescribed were grossly disproportionate in population, unlike the situation in *Fortson* (*Sailors* Br. 86–89). We pointed out that not only would the voters' selectivity among candidates be substantially reduced under the scheme, but also that it is a fair as-

which members of the council of the recently consolidated city of Virginia Beach were elected did not constitute an "invidious discrimination", the Court concluded that the at-large feature of the plan, whereby all voters elected all 11 councilmen, was sufficient to save the scheme from constitutional attack, since each councilman presumably represented all of the city's voters and not just those residing in the residence district in which he was required to live (387 U.S. at 115–116).

In addition, the Court noted that the arrangement constituted an accommodation to the problems incident to consolidation, that the scheme was such that the more populous boroughs could elect a majority and possibly all of the council, and that "different conclusions might follow" if "residence [were] only a

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sumption that those members residing in the sparsely populated districts will not adequately represent those persons living in the more populous areas. That argument was rejected by this Court, which found the residence district requirement "not fatal" and relied on *Fortson* in stating that each of the seven members required to live in prescribed districts was "nonetheless the city's, not the borough's councilman," and took the view that the fact that "[i]n *Fortson* there was substantial equality of population in the senatorial districts, while here the population of the boroughs varies widely," was not dispositive (387 U.S. at 115–116). We point out, however, that in addition to the Court's *caveat* that "[i]f a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow" (*id.* at 116), the *Fortson* opinion noted that "designedly or otherwise, * * * under the circumstances of a particular case," such schemes might "operate to minimize or cancel out the voting strength of racial or political elements of the voting population" (379 U.S. at 439; see also 387 U.S. at 117, quoting similar language from the district court's opinion).

front" and "a borough's resident on the council represented in fact only the borough * * *" (*id.* at 116).[51]

[51] In the concluding paragraph of the *Dusch* opinion, the Court stated that the 7–4 plan "seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside" (387 U.S. at 117). In light of the rejection of the argument in *Reynolds* and related cases that rural areas should be accorded more representation than population alone would give them (see 377 U.S. at 567–568), this language can hardly be read as sanctioning the favoring of rural over urban residents simply because of where they live. Rather, an important concern of the Court apparently was the preservation of flexibility with respect to governmental arrangements achieved through compromise incident to a consolidation of previously separate local units—there a city and county which merged into one large municipality. This view is confirmed by the extensive quotation from the district court's opinion which the Court included just prior to this language (387 U.S. at 116–117). That quotation refers to the need, "during an appreciable transition period," for a compromise arrangement which would ensure some voice for all areas of the newly formed city, and notes that the plan gives no "controlling influence" to the smaller boroughs (*id.* at 116). On this latter point, the Court itself, noting the population of the various boroughs, pointed out that the more populous boroughs could elect all eleven councilmen "if united in their efforts" (*id.* at 117, n. 5). Likewise, the Court must also have taken into account the fact that the larger boroughs could, despite the disparity in population among the seven residence districts, elect at least a majority of the members of the city council from among their own residents. This is so, of course, because four of the eleven seats had no residence requirement. Lynnhaven and Bayside, with over 60 percent of the city's population, could thus elect at least a majority of the council members, *i.e.*, the four at-large members and the two from those two residence districts. Those two salient features of the Virginia Beach situation—consolidation of formerly independent governmental units and the ability of those residing in the more populous residence districts to elect a majority of the members of the body—will not generally be

How broadly or narrowly the *Dusch* holding should be applied in other situations remains an open question. There appear to be significant hazards in an expansive reading of that decision, and, pressed to the ultimate, *Dusch* may have untoward and undesirable consequences in other similar, yet distinguishable, situations. Indeed, although we do not so interpret it, *Dusch* might be regarded as holding that, however disparate the population of prescribed residence districts, and whatever the circumstances which led to the adoption of such a plan, the scheme meets constitutional muster so long as an at-large election is provided for and all of the voters in the jurisdiction participate in that election. At least one court of appeals already has apparently so construed that decision. In *Davis* v. *Thomas County, Georgia,* No. 23,882 (decided June 26,

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presented in other cases in which reliance on *Dusch* is sought to be placed. Those considerations were undoubtedly of considerable significance in shaping the Court's conclusion that the plan involved no "invidious discrimination", and provide, in the government's view, a proper rationale for limiting the sweep of that holding and avoiding the undesirable consequences which might otherwise flow from a broad reading of *Dusch* (see the discussion *infra*, pp. 35–36). The fact that those residing in the populous areas can elect a majority of the body's members—a situation not presented in a recent Fifth Circuit decision relying on *Dusch* (see *infra*, p. 36) nor under many schemes where residence districts are prescribed for every seat—is undoubtedly an important factor in determining whether there is any significant impairment of the right to vote. Similarly, the fact that a particular plan arose out of circumstances of consolidation of governmental units is a relevant consideration is assaying the fairness of a particular plan (see *infra*, pp. 37–38). That too will be the unusual, rather than the ordinary, situation.

1967), the Fifth Circuit affirmed the dismissal of a complaint challenging the districting scheme for the election of a Georgia county board on the authority of *Dusch*. There all of the eight members were elected at large, but of the prescribed residence districts, only two were allocated to the City of Thomasville, although about 60 percent of the county's population resided there.[52]

So viewed, then, *Dusch* would be an open invitation to avoid the implications of *Reynolds*, at least at the local level, through the device of unequally populated residence districts coupled with at-large elections. And it is difficult to see why, if that is indeed the teaching of *Dusch*, such a device could not be utilized at the State legislative level as well. But it is not, in our view, necessary to construe that holding expansively. A narrow reading of *Dusch*, which would limit it essentially to the factual circumstances there involved, is not foreclosed to the Court, can be predicated on sound grounds, and seems to us to be plainly indicated.

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[52] Similarly, it has come to our attention that several suits challenging districting arrangements for Mississippi county boards have been or will be dismissed on the basis of the county's adopting, of being ordered to adopt, an at-large election scheme, while maintaining the grossly disproportionate districts, which had existed previously, as residence, instead of election districts. That procedure is authorized by a 1966 Mississippi law—Section 2870, Miss. Code Ann., as amended (see *Martinolich* v. *Dean*, 256 F. Supp. 612, 616 (S.D. Miss.); see also *Sailors* Br. 89, n. 88). In *Martinolich* the three-judge court which held the existting plan invalid was dissolved, and a single judge ordered at-large elections in Hancock County as authorized by the recently amended law.

In *Dusch* the Court stressed its concern that application of the equal-population principle at the local-governmental level might have the undesirable effect of deterring consolidation of previously independent local units (see note 51, *supra*). Assuming its relevance, we believe that consideration can be taken into account consistent with *Reynolds* and with its application at the local level. Accordingly, in our view, there is no reason to create a constitutional anomaly by holding *Reynolds* inapplicable at the local level because of the possibility that some consolidations of local units might be deterred if it were held applicable. Nor does this consideration require a mechanical rule that would condone any district arrangement, however significant the deviations from a population basis, if a consolidation at the local level is involved. There is little evidence of any substantial movement towards consolidation at the local level, except as among school districts (see *Sailors* Br. 19, n. 27), and, of course, constitutional decision-making cannot be controlled by the mere chance that a few desirable developments in governmental restructuring might thereby be fostered. It would be anomalous indeed if gross inequality in voting rights were to be regarded as an acceptable price for an insubstantial amount of governmental reorganization.

This is not to say, however, that a flexible approach toward consolidations at the local level cannot be taken, consistent with *Reynolds* and the Equal Protection Clause. When a consolidation has in fact been

accomplished, it would be appropriate to sanction some deviations from a population basis in the local body's districting plan if those deviations were rationally related to the compromise necessary in achieving consolidation, will be reconsidered and probably revised after an interim period of adjustment, and are not so extreme as to permit minority dominance of the particular body. That would not be at odds with the rejection of the so-called federal analogy as to State legislative arrangements in *Reynolds,* for the Court there noted that the representational system for Congress was "one conceived out of compromise and concession indispensable to the establishment of our federal republic" (377 U.S. at 574), whereas the invocation of that precedent at the State level was often "little more than after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements" (*id.* at 573). As to governmental arrangements at the local level, however, reliance on the necessity for compromise would not necessarily be but "an after-the-fact rationalization" for a maladjusted scheme. Rather, such compromise as to the representational system may justifiably be shown to have been an essential ingredient in achieving the consolidation, with formerly separate units agreeing to go along only if some of their previous quasi-sovereignty over local matters is preserved. See Note, *Reapportionment,* 79 Harv. L. Rev. 1228, 1278–1280 (1966); see also Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government,* 65 Colum. L.

Rev. 21, 36–40 (1965); cf. *Blaikie* v. *Wagner*, 258 F. Supp. 364, 367–370 (S.D. N.Y.).[53]

In discussing an approach which, consistent with applying *Reynolds* at the local level, would maintain flexibility in circumstances involving a consolidation of local units, we do not mean to suggest that the Court must resolve the question in this case. But if we are correct in our conclusion that the fundamental constitutional issue whether *Reynolds* is generally applicable at the local governmental level is not to be dictated by the consideration that intergovernmental consolidations may sometimes require compromise as to districting arrangements, it is apparent that the *Dusch* holding plays no significant role in the instant situation. Not only is it at all events clear that *Dusch* did not resolve the broad constitutional question here presented. No consolidation was achieved or attempted in Midland County. No residence districts are involved in the districting plan under attack—the districts prescribed are plainly election districts. There is no at-large election of county commissioners in Midland County—each is elected within his own district and only by the voters residing in that particular district. Thus, even if *Dusch* is read broadly—as the Fifth Circuit did in *Davis* (see *supra*, pp. 35–36), it has no bearing on the resolution of the question whether, where a district-based election of members of a local governmental body is involved, the equal-population principle of *Reynolds*

[53] See generally U.S. Advisory Commission on Intergovernmental Relations, Factors Affecting Voter Reactions to Governmental Reorganization in Metropolitan Areas (1962).

requires that the prescribed districts be substantially equal in population.[54]

[54] Only a few other decisions by lower courts on the question of the applicability of the equal-population principle at the local level, which have intervened or have come to our attention since the filing of our *Sailors* brief last Term, are deserving of mention. In *State of Indiana* v. *County of Lake*, 27 Court Decisions on Legislative Apportionment (National Municipal League) (hereinafter "C.D.L.A.") 1 (Lake Co., Ind. Super. Ct.), the court ordered the Gary Common Council to pass an ordinance effecting "an apportionment of the electors in the City of Gary in order that each of the six councilmanic districts of the City of Gary shall contain as nearly as possible an equal number of electors" (*id.* at 3). Similarly, a number of New York State courts have recently applied the holding of *Seaman* v. *Fedourich*, 209 N.E. 2d 778, where the New York Court of Appeals determined that *Reynolds* applied at the local governmental level (see *Sailors* Br. 43–44, and n. 48) to additional county boards and city councils in that State. In addition, the New York Court of Appeals has recently reaffirmed its holding in *Seaman*, in a case decided subsequent to and in light of this Court's holdings in *Sailors* and *Dusch*. In that case, *Iannucci* v. *Board of Supervisors of Washington County*, 20 N.Y. 2d 244, the New York court viewed this Court's decisions as not resolving the basic constitutional question and thus not impairing its earlier holding in *Seaman*. Mention should also be made of *Skolnick* v. *Kerner*, 387 U.S. 91, involving a challenge to judicial apportionment in Illinois, where the appeal was dismissed for want of a substantial federal question. See also *Buchanan* v. *Rhodes*, 249 F. Supp. 860 (N.D. Ohio), appeal dismissed, 385 U.S. 3, where the district court dismissed an action challenging the allocation of common pleas court judges among the counties in Ohio, on the ground that judges, unlike legislators, do not function as representatives, even if elected, and that *Reynolds* thus did not apply, and *New York State Ass'n of Trial Lawyers* v. *Rockefeller*, 267 F. Supp. 148 (S.D. N.Y.), a virtually identical case which was disposed of in a similar fashion. In regard to other similar cases, see *Sailors* Br. 106–107, n. 110. And see *Shanker* v. *Regents of the University*, 19 N.Y. 2d 951, where the New York Court of Appeals affirmed the Appellate Division's holding (27

III

NO DISTINCTION SHOULD BE MADE ON FUNCTIONAL LINES IN REGARD TO THE APPLICABILITY OF THE EQUAL-POPULATION PRINCIPLE AT THE LOCAL LEVEL

Certain of the language in this Court's opinion in the *Sailors* case (see *supra*, pp. 28–29) might possibly be read as suggesting a distinction as to the applicability of the equal-population principle depending upon a classification of the functions performed by various local governmental bodies. And much of the questioning at the oral argument of the four cases decided last Term similarly indicated a concern as to the nature and powers of the bodies involved. Some support for limiting the applicability of *Reynolds* to bodies which exercise legislative as distinguished from essentially administrative functions might also be drawn from language in various State and lower federal court

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App. Div. 2d 84). that the system of electing members of the Board of Regents of the University system in New York did not violate the Equal Protection Clause. That system involved the election of the 15-member board by the State legislature; eleven are chosen from the State's eleven judicial districts, which are disproportionate in population, and four at large. In affirming upon the Appellate Division's opinion, the Court of Appeals cited this Court's decision in *Sailors* as additional authority (19 N.Y. 2d at 952). Finally, mention should also be made of *Detroit Edison Co.* v. *East China Twp. School District No. 3*, pending on petition for certiorari, No. 543, this Term, which does not involve a direct challenge to the composition of a local governmental body, but instead relates primarily to the propriety of the annexation procedure utilized in consolidating school districts (see *Sailors* Br. 59, 94).

opinions in local government cases.[55] And an argument along these lines might be evolved from some of the language of the *Reynolds* opinion itself and from the fact that the bodies involved there and in related cases, and in *Wesberry* v. *Sanders*, were all legislative in character. It is the government's position, however, that such a distinction is neither sustainable as a matter of constitutional law nor desirable or practicable as a matter of judicial policy. But the recurrence of the notion of a functional distinction suggests a fuller exposition of our views on this matter.

1. As developed at some length in the *Sailors* brief (pp. 38–41), the Court's decision in *Reynolds* was not grounded on any considerations unique to, or inherent in, State legislatures, as distinguished from other sorts of governmental bodies whose members are elected from districts. While there are some references in the *Reynolds* opinion to the fact that State legislators

[55] *E.g.*, *Seaman* v. *Fedourich*, 209 N.E. 2d 778, 782 (N.Y. Ct. App.); *State ex rel. Sonneborn* v. *Sylvester*, 132 N.W. 2d 249, 255 (Wis.); *Hanlon* v. *Towey*, 142 N.W. 2d 741, 745 (Minn.); *Armentrout* v. *Schooler*, 409 S.W. 2d 138, 143 (Mo.). It should of course be noted that any suggestion of a distinction along legislative/administrative lines by these courts was simply *dicta*, since all of the courts regarded the bodies whose districting was at issue to be sufficiently legislative in character and thus concluded that, at least as to those kinds of bodies, the equal-population principle was applicable. Compare, however, *Strickland* v. *Burns*, 256 F. Supp. 824 (M.D. Tenn.), and *Delozier* v. *Tyrone Area School Board*, 247 F. Supp. 30 (W.D. Pa.), in which *Reynolds* was applied to districting arrangements for school boards which could hardly be viewed as essentially legislative in character; compare also *McMillan* v. *Wagner*, 21 C.D.L.A. 101 (S.D. N.Y.) (see the discussion in note 59, *infra*).

exercise law-making functions,[56] the constitutional touchstone of that decision is the Equal Protection Clause of the Fourteenth Amendment, and the focus is on the individual voter, not the nature of the bodies whose apportionment was at issue. The essence of the holding in *Reynolds* certainly transcends the particular factual circumstances out of which that and related cases arose; it is more basic—that a citizen's right to vote, where conferred under State law, cannot be diluted or debased simply because of where, within a particular area, that citizen happens to reside.[57] Residence, in other words, is an impermissible

[56] An argument grounded on certain language in *Reynolds* in this regard (see 377 U.S. at 562, 565) is quite unconvincing, in our view, because it seems quite reasonable for the Court to have there used language relating to the type of governmental body before it in that case. Similarly, the fact that the bodies involved in *Reynolds* and related cases and in *Wesberry* were legislative in character cannot properly be viewed, as a constitutional matter, as a determinative factor in those decisions (see the discussion *infra*, pp. 43–45; see also *Sailors* Br. 32–33, 38–40, 73). Rather, language such as that in *Reynolds*, stating that State legislatures "are responsible for enacting laws by which all citizens are to be governed" (377 U.S. at 565), or that in *Wesberry*, referring to "the election of those who make the laws under which, as good citizens, we must live" (376 U.S. at 17), did no more than accurately refer to the context in which those decisions were rendered and the background against which the constitutional questions were presented. Cf. *Gray* v. *Sanders*, 372 U.S. 368 (see *infra*, pp. 44–45). Nor, as a matter of consistent constitutional decision-making, can those decisions be properly limited to the legislative situations there involved (see generally *Sailors* Br. 29–41).

[57] *Reynolds* was plainly not grounded on any considerations stemming from the Guaranty Clause, for the Court had earlier rejected the argument that apportionment questions were cognizable under that constitutional provision in *Baker* v. *Carr*, 369 U.S. 186, 218–229 (see 377 U.S. at 582).

basis on which to treat differently citizens otherwise similarly situated, and they are treated differently, as a constitutional matter—and thus discriminatorily—if the vote of one is overweighted and that of another underweighted under an apportionment or districting scheme (see 377 U.S. at 562–568). Such discrimination is neither greater nor lesser, whether malapportionment exists at the State or at the local level. Consistency and logic thus require application of the equal-population principle of *Reynolds* to local governmental bodies, once its constitutional underpinnings are recognized. Any other conclusion would result in a distinct constitutional anomaly, for the engrafting of a legislative/administrative line of distinction would, in our view, be a significant departure from the teaching of *Reynolds*.

Nor could such an approach be squared with this Court's decision in *Gray* v. *Sanders*, 372 U.S. 368. That case, decided before *Reynolds*—indeed the first case after *Baker* v. *Carr* decided by this Court on a substantive basis—and relied on in *Reynolds* (377 U.S. at 557–561), held the Georgia county-unit system invalid. While *Wesberry*, *Reynolds* and related cases involved legislative offices, *Gray* involved offices essentially executive and administrative in character, albeit Statewide in nature (see *Sailors*, 387 U.S. at 108, n. 4, for a listing of those offices). *Gray* is thus a constitutional precedent which plainly holds that the requirements of the Equal Protection Clause with respect to the weighting of votes in State elections are not limited to legislative offices (see *Sailors* Br. 83–

84, n. 79; see also note 56, *supra*); its impact in this regard cannot properly be disregarded.

In sum, if the Equal Protection Clause requires districts for electing State legislators to be substantially equal in population, it can hardly be inapposite with regard to the district-based election of members of local governmental bodies—however their nature, powers and functions be characterized. Otherwise, citizens similarly situated can be treated differently, as to the weight of their vote, on the basis of where they happen to reside. Thus the government's position is basically that, where State or local law provides for the election of members of local governmental bodies from districts, the Equal Protection Clause—and specifically the equal-population principle of *Reynolds* which derives from that constitutional provision—requires that those districts be substantially equal in population.

2. Not only would a legislative/administrative distinction, in regard to the applicability of the equal-population principle at the local level, be difficult to sustain as a matter of consistent constitutional decision-making; it would be wholly impracticable in any event. Espousal of such a distinction necessarily assumes that, as a practical matter, a line can be sensibly drawn in this regard, and that it is possible to categorize local governmental bodies as legislative or administrative. We regard this as a fallacious and potentially dangerous assumption.

Local governmental bodies—at least general-function units—are generally repositories of an amalgam of various powers and engage in a variety of dif-

ferent and diverse functions.[58] Some might be classified as legislative, some as administrative, some as executive, some as quasi-judicial, and some virtually defy description. One is often reduced to little more than quite arbitrary labelling. In his concurring opinion in *Strickland* v. *Burns*, 256 F. Supp. 824, 836 (M.D. Tenn.), Judge Miller perceptively concluded that "[i]t is fruitless * * * to pursue the elusive distinction between legislative and administra-

[58] See Note, 53 Va. L. Rev. 953, 960–961, 965–966 (1967), which explicitly questions the utility of a legislative/administrative distinction "as an analytical tool for dealing with the problem of representation in government at the local level," stating (*id.* at 965): "Seldom can any local governmental body be said to exercise solely administrative powers. The wide variation in the functions performed by these local bodies, and in many cases the mixture of functions assigned to one body, render any ~~not~~ nice distinctions very difficult to draw." Doubting "the validity of the distinction itself," it is further stated (*id.* at 965–966): "The changing nature of the functions performed by 'administrative' agencies in an economy which is taking on more and more aspects of government planning raises the question whether any segmentation of government powers between 'legislative' and 'administrative' can be made even in theory. * * * 'Administrative' bodies formulate and carry out policies whose ramifications are easily as great for various interests within the body politic as many decisions made by 'legislative' bodies. Neat compartmentalization of government functions, either in terms of types of decision-making or of the need for popular representation, no longer seems possible." See generally 2 McQuillin, *Municipal Corporations*, § 10.06, pp. 747–750; §§ 10.40–10.40a, pp. 845–854 (1966); Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Colum. L. Rev. 21 (1965); see also Rhyne, *Municipal Law*, § 4–6, p. 69; § 5–2, pp. 79–80 (1957).

tive functions."[59] Indeed, it would appear to be not only a fruitless but a virtually impossible task. There is simply no easily available touchstone for determining whether a body exercises legislative functions or

[59] In *Strickland*, a county school board case, the court refused to accept the suggested legislative/administrative distinction, finding "no basis for applying the 'one man, one vote' rule to the congeries of powers possessed by the Legislature itself and at the same time denying its application to a subordinate body simply because it possesses a fractional part of those powers, so long at least as the fractional part cannot be said to be insignificant or unimportant * * *" (256 F. Supp. at 827). In concurring, Judge Miller further stated (*id.* at 836): "Many attempts have been made to draw the [legislative/administrative] distinction in varied contexts. But whatever value the dichotomy may have for some purposes to rationalize a particular result, I am convinced that it is inapposite here. So long as a subordinate body is vested with significant and important powers of government, whether they be labelled legislative, or administrative, or both, I can see no reason why it should be permissible under the equal protection clause for a state arbitrarily to debase the value of one person's vote in favor of another." See also *Delozier* v. *Tyrone Area School Board*, 247 F. Supp. 30, 35 (W.D. Pa.), and Note, 20 Vand. L. Rev. 649 (1967), discussing *Strickland*. And in *McMillan* v. *Wagner*, 21 C.D.L.A. 101, the court denied a motion to dismiss grounded on the argument that the Board of Estimate of New York City does not possess legislative power and that *Reynolds* was inapplicable to local governmental bodies which are non-legislative in character. Holding that the Board members were the elected representatives of their boroughs and that the Board exercised governmental powers over a number of important matters, the court found any legislative/administrative distinction irrelevant, stating (*id.* at 109): "Defendants' characterization of these powers delegated to the Board of Estimate as 'executive-administrative,' and their distinction between 'executive-administrative' and 'legislative' powers, misconceives the scope of the reapportionment cases. The Supreme Court, in *Gray* v. *Sanders* * * *, held that citizens have a right to have their votes for state governor equally counted. No state office could be more clearly executive-administrative, and not legislative, than that of governor" (see *Sailors* Br. 53; see also *supra*, pp. 44–45).

whether its actions are essentially administrative in character. Given the mixture of powers which such bodies exercise, and the variety of fields in which at least general-function units act, there is not even a sound starting place for analysis along these lines. Certainly the power to enact ordinances, or the lack of that power, should not be regarded as determinative.[60] While most general-function units have the ordinance-enacting power, others which do not still take important and significant actions in a variety of other ways.[61] It seems plain that the *way* in which a body's

[60] Reliance on the ordinance-enacting power as a criterion for determining whether the local body is legislative or administrative in character would make the vagaries of State law decisive as to whether a federally protected right to equal representation at the local level would or would not exist. Thus, in effect, a State would be given the power to determine whether a particular local body, albeit elected by the people, would fall within or without the equal-population principle, simply on the basis of the manner in which it is authorized to act. Not only, then, would such a rule not be necessarily in accord with the substantive powers of the body; it would present an opportunity for manipulation that would have undesirable and anomalous consequences (see *Sailors* Br. 104–105). A local body in one State would be required to abide by the equal-population principle, while a like body in another State would not, although both exercise identical powers, simply because one could and did act through ordinances while the other, lacking the ordinance-enacting power, passed by-laws or resolutions relating to the same matters and having the same effect.

[61] Most municipalities have, through charter or statute, the authority to enact ordinances; many counties, on the other hand, do not have such power, but take official actions in a variety of different ways. In some States the authority of local bodies to enact ordinances is implied; in others it is held not to exist unless expressly conferred. See generally 2 McQuillin, *Municipal Corporations*, § 10.30, pp. 815–816; § 10.34, pp. 828–830 (1966); 5 *id.*, §§ 15.01–15.26, pp. 45–121 (1949).

powers are exercised cannot provide a useful criterion for constitutional decision-making. Tying the applicability of the equal-population principle at the local level to the power to enact ordinances would involve a highly formalistic approach not in accord with the underlying realities and would offer an easy avenue of escape from the thrust of *Reynolds* at the local level (see note 60, *supra*).

It would probably be possible to apply a legislative/administrative line of distinction to extreme cases at both ends of the local government spectrum. There are bodies whose powers and functions are so significant and sweeping that anyone would conclude that they of course are legislative in character; the city councils of our large cities and the county boards of our populous counties, particularly those exercising some form of home rule, would fit into such a category. Similarly, at the other extreme, there are undoubtedly bodies, even some general-function units, whose powers are so limited and whose functions are so circumscribed, that it would be rather easy to conclude that they simply cannot be said to be legislative in character. But, apart from these unusually clear-cut situations, there would remain the vast majority of local governmental bodies which defy any sort of easy characterization. Such labels could probably be attached eventually, and lines drawn in some fashion, but it would only be at the expense of having the judiciary—federal and State—almost interminably involved in that process. It would of course be up to this Court to give coherence and consistency, so

far as it would be possible to do so, to the predictably variant decisions—from State to State—of the lower federal and State courts, and thus this Court as well would be faced with the spectre of actively participating, in a substantial and continuing way, in this difficult line-drawing process. In the government's view, there is no warrant for imposing that additional burden on the judiciary, just as there is little assurance that the results of such an endeavor would be meaningful.

Thus, the sort of functional approach which some suggest, considering the nature of local governmental bodies, seems to be one which is unworkable in practice and virtually impossible of reasoned and judicially economical application.[62] We submit that a holding which would limit the scope of the equal-population principle to bodies exercising legislative functions would be both bad law and bad policy.

3. In opposing the drawing of a line between bodies exercising legislative powers and those engaged in essentially administrative functions, we do not reject the possibility that certain distinctions may nevertheless be relevant and feasible. While we continue to be-

[62] If any such distinction is to be drawn—and we do not suggest that it would be proper to do so—it would appear preferable to draw it according to whether the body exercises policy-making functions or, instead, acts in an essentially ministerial way in conducting its activities. That sort of line—distinguishing between bodies exercising "discretionary" powers and those with only "ministerial" functions—is already an accepted one in the local government context, would seem susceptible of somewhat easier application, and would also appear to accord more with the underlying realities. See generally 2 McQuillin, *Municipal Corporations*, §§ 10.32–10.33, pp. 818–828; §§ 10.40–10.41, pp. 845–858 (1966).

lieve that, at least *prima facie,* the equal-population principle should be held applicable to all governmental bodies elected on a district basis, we recognize that there might be particularized situations in which population should not be the sole determinant of compliance with *Reynolds*—at least as to so-called special districts.[63]

[63] We included in our *Sailors* brief (pp. 20–22, 101–106) a discussion of special districts in order to provide the Court with a complete picture of the background against which the broad constitutional question was presented (see *Sailors* Br. 101). And, although no such bodies were involved in the four cases then under consideration, we suggested that, as a *prima facie* matter, the equal-population principle should be regarded as applicable to them as well (*Sailors* Br. 103). While logic and consistency seem presumptively to support a straightforward application of that principle to the governing boards of special districts whose members are elected from districts, we indicated that our view as to its applicability to such units was a more tentative one than with respect to general-function units, like counties and cities, and to school boards, although the latter are more appropriately regarded as special-function units. Our guarded *caveat* in this regard was grounded upon the consideration that some special districts perform rather specialized functions which principally affect only a particular segment of the citizens residing within its jurisdiction—*e.g.*, conservancy, drainage or irrigation districts (see *Sailors* Br. 102–103).

Our *Sailors* brief also noted (p. 104) that some sort of *de minimis* rule might be evolved, at least as to special districts, which would except from the reach of the equal-population principle those bodies whose powers and functions are relatively unimportant and insignificant. We do not pursue that approach because such a rule would predictably leave within the ambit of the principle the vast majority of *elected* local bodies, since most of them, however their functions are characterized, in fact do important things which have a substantial impact on people. And, as developed in the *Sailors* brief (pp. 103–105), a *de minimis* rule would probably neither be productive of consistent results nor workable in practice.

As *Reynolds* itself points out, the Equal Protection Clause "has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged" (377 U.S. at 565).[64] Indeed, the Court's decision rests on the premise that "[w]ith respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live" (*ibid.*). Applying this consideration to local governmental bodies, it seems a fair and reasonable assumption that, with respect to general-function units, all citizens stand in substantially the same relation to such bodies regardless of where they live within the area of the particular body's jurisdiction (see the discussion *infra*, pp. 55–57). Similarly, all citizens appear to be similarly situated in regard to their respective school boards, because of the pervasive effect and broad sweep of public education in this country (see note 70, *infra*). But the same conclusion seems somewhat less obvious with respect to special districts. At least as to some of those

[64] Implicit in this traditional view in Equal Protection Clause litigation is the converse notion that, where persons are not similarly situated and do not stand in the same relation to the governmental action in question, different treatment is permissible and classifications are valid so long as they are rationally related to the purposes of the legislation and take properly into account the differences in how the persons are situated. For a more expansive articulation of the general approach taken in this regard in other Equal Protection Clause cases—albeit not involving voting rights—see *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488–489; *Morey* v. *Doud*, 354 U.S. 457, 465–466; *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527–528; *McLaughlin* v. *Florida*, 379 U.S. 184, 190–194. See also *Carrington* v. *Rash*, 380 U.S. 89, 92–93.

bodies, it may be too facile to infer from the decision to provide for an election from districts that all citizens are similarly situated *vis-à-vis* the particular body, and "stand in the same relation" with respect to the allocation of representation on that body.[65]

Where a governmental body's actions do not touch or involve citizens generally, but only a discrete and identifiable part of the citizenry in a significant way, then a districting plan which rationally takes this consideration into account may comport with the requirements of the Equal Protection Clause, even though this entails substantial deviations from a population basis. Such a plan might allow only certain persons to elect the members of such a body, might weight the votes of those directly affected by that body's actions more heavily than others, or might simply arrange the districts so that effect would be given to the fact that the body acts in a way which primarily affects only certain citizens.[66] This

[65] On the other hand, it could be maintained that the provision for district-based elections of the members of the governing boards of special districts should be regarded as reflecting a design that the particular body be controlled by the voters in the geographic area over which it has jurisdiction, and that, in such a situation, no further inquiry about that body's powers and functions should be made.

[66] For instance, in this limited situation, property-holding or taxpaying qualifications for voting might be appropriate (compare *Harper* v. *Virginia Board of Elections*, 383 U.S. 663), if the actions of the body involved directly affect only certain property owners or taxpayers; alternatively, the amount of land owned might be taken into account in determining the weight of a person's vote. See, *e.g.*, Ariz. Rev. Stat. Ann., Sec. 45–1207, providing for the dividing of drainage districts into "divisions as nearly equal in size as practicable," and that one di-

might be allowable even though the body's jurisdiction theoretically extends over the entire area and includes some citizens not affected in any direct way by the body's actions. On the other hand, it would seem that such an approach would be impermissible if the particular body, despite the narrow scope of its powers, had the authority to tax the citizens of the entire area generally. Such a susceptibility to taxation would appear to give all citizens a significant enough interest in that body's actions to warrant an equal voice for each—albeit some are more directly affected by the body's exercise of its other substantive powers.

In other words, since *Reynolds* assumes that all citizens are similarly situated *vis-à-vis* the body whose members are to be elected, where the contrary can be shown and where a districting plan is rationally and intentionally grounded on such a consideration, deviations from the equal-population principle may be permissible. This line of analysis does not

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rector of the body shall be elected from each such division; Sec. 45–1209 requires the ownership of real property on which taxes have been paid in order to vote in drainage district elections. Similarly, see also Ariz. Rev. Stat. Ann., Secs. 45–1517, 45–1612, relating to irrigation districts and providing for a like pattern with respect to districting—"as nearly equal in acreage as practicable"—and the qualifications of voters participating in the election of the directors of those bodies. In addition, it should be noted that it may violate the Due Process Clause if an attempt is made to tax property which is so situated geographically that it could derive no benefit from that taxation. See *Myles Salt Co.* v. *Board of Comm'rs of Iberia & St. Mary Drainage District*, 239 U.S. 478; *Thomas* v. *Kansas City So. Ry. Co.*, 261 U.S. 481.

mean that Reynolds is wholly inapplicable in this limited class of situations. Rather, it simply reflects the fact that that decision is grounded on the Equal Protection Clause, and that that constitutional provision, properly considered, may in some circumstances justify departures from a rigid rule of equality in population among districts as to at least some local bodies, *i.e.*, certain special districts.[67]

It might be suggested that the same sort of approach should be regarded as applicable to at least some general-function units as well. Indeed, in the instant case the Texas Supreme Court pointed out that the county board functions mainly in the rural areas of the county, while many of the governmental functions relating to the city residents are handled by the city council (see R. 149).[68] A similar argument was made in regard to the county board involved in the *Moody* case last Term. The short answer, in our view, is that virtually all general-function units in fact exercise powers which have a substantial impact on all citizens subject to their jurisdiction, wherever they reside within the area of the body's authority. The

[67] Such an approach would not, however, be pertinent to all special districts, since some of these units are multi-purpose in character and at least certain of their functions affect all citizens quite directly, and, as well, since the nature of some single-function special districts is such that all citizens should be regarded, *vis-à-vis* those bodies, as similarly situated (see *Sailors* Br. 19–21; 104–105). See generally Bollens, *Special District Governments in the United States* (1957).

[68] At a later point we discuss the question of the overlapping jurisdiction of local governmental bodies exercising general governmental functions (*infra*, pp. 65–70), and also consider the nature, powers and functions of the county board here involved (*infra*, pp. 58–60).

power to tax is a sufficient example: the traditional motto "no taxation without representation" seems to foreclose any argument that a citizen has no legitimate claim to an equal voice in choosing a governing board that can assess taxes on, and collect taxes from, him, wherever he might reside.

To be sure, some general-function units may have a more significant effect on one part of the citizenry—those living in rural areas, for example. But it is, as a general matter, merely a difference of degree. Moreover, any attempt to appraise how substantial a particular general-function unit's powers are in relation to citizens subject as well to the authority of another such unit seems quite impracticable.[69] While such an approach might be feasible as to special districts, it would seem to present insurmountable problems with respect to general-function units. And, at all events, a satisfactory alternative for dealing with the matter of overlapping jurisdiction appears to be available (see the discussion *infra*, pp. 69–70). Thus, it seems reasonable to conclude that, although some general-function units may have a somewhat different impact on some classes of citizens than on others, all of the citizens, wherever they reside within the jurisdiction, should nevertheless be regarded as having the same basic relationship to that sort of body. Thus, where the members of such a body's governing board are

[69] Some sort of quantitative determination in this regard—quite complex in nature—would seem essential before it could be decided whether a districting plan which deviated from population properly took into account the varying impact of the particular body on somewhat differently situated citizens.

elected from districts, the equal-population principle, we submit, should be held applicable, without further inquiry.[70]

[70] Similarly, school boards should be so regarded and treated, although in a sense special-function units, because of the significance of public education generally, the fact that all citizens provide financial support to the schools, and the like impossibility of determining, with any precision or exactitude, the manner in which school boards have a different impact on certain citizens. In our *Sailors* brief (pp. 103–104, n. 108), we attempted to delineate why a distinction as to applicability based on whether a general-function unit or a special-function unit was involved was, in our view, unsatisfactory, and why, in any event, school boards whose members are elected from districts should be covered by the equal-population principle. We recognize that an argument might be made that parents of school children constitute a class peculiarly concerned with school boards, and that a distinction between them and citizens generally might properly be taken into account in applying *Reynolds* to districting for elected school boards. But public education is hardly of interest only to the parents of children presently attending public schools (see *Sailors* Br. 98, n. 99). As stated by the Court in *Brown* v. *Board of Education*, 347 U.S. 483, 493: "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship." Nor is the interest of non-parents in public education only a general one. They, like parents, pay the taxes which support the schools.

IV

WHATEVER DISTINCTIONS MIGHT BE DRAWN AS TO APPLICABILITY OF THE EQUAL-POPULATION PRINCIPLE AT THE LOCAL LEVEL, THAT PRINCIPLE SHOULD CONTROL THE ELECTION OF THE COUNTY GOVERNING BOARD HERE INVOLVED

Even if some sort of functional approach is adopted in determining the applicability of the equal-population principle at the local level, or other distinctions in this regard are made, the county governing board whose districting scheme is at issue here should in any event be found within the ambit of that principle. As the discussion of the powers and functions of the Midland County Commissioners Court in the Statement (*supra,* pp. 4–7) plainly shows, that body exercises important governmental powers affecting all citizens of the county. If a legislative/administrative distinction is held pertinent, the county board here involved should be regarded as legislative in character, even though it apparently does not have the authority to enact ordinances, for it functions as a law-making body in a different, though analogous, manner. Significantly, the Commissioners Court has the power to tax all residents of the county—typically legislative action. It sits as a board of tax equalization in approving the assessments of property values, and expends funds for a variety of public purposes which concern the citizens of the county as a whole. It adopts a county budget, buys county equipment, lets contracts for the construction of public works, authorizes the sale and issuance of bonds, approves the expenditure of bond funds, deter-

mines the distribution of county road and bridge funds, condemns land, calls elections, canvasses election returns and appoints election officials. In addition, its statutory powers include the administration of the county's public welfare and public health services; the establishment of a county hospital, library, courthouse and jail; the appointment of various county officials and the filling of vacancies in elective positions (see *supra*, pp. 4–5).[71] Such an extensive panoply of powers cannot be regarded as insignificant or insubstantial.[72]

[71] In addition, county boards in Texas have the power to establish and change the districts from which the members of those bodies are elected (see *supra*, p. 6). Thus, compliance with a requirement to redistrict need be neither time-consuming nor cumbersome, since no constitutional amendment or even statutory enactment would be necessary (see *Sailors* Br. 113). Furthermore, this consideration points to the futility of assuming that any adjustment of the existing malapportionment might be achieved through the political process, without any judicial intervention (see *Reynolds*, 377 U.S. at 569–570). Indeed, efforts to have the Commissioners Court here involved change the districting so as to accord additional representation to those residing in the City of Midland met with failure (*supra*, p. 8; see R. 5–7).

[72] While there are undoubtedly county governing boards with more sweeping powers than this body (see *Sailors* Br. 8; 81–82, n. 77), it seems plain that its powers, whatever the manner in which exercised, have an important impact on and directly affect all the citizens of Midland County. Without stretching the concept unduly, it does not seem inappropriate to regard it as a "little legislature" (see *Sailors* Br. 16–19; 73). A significant factor in this regard is that Texas law prescribes that the members of that body are to be elected by all of the voters in the county. It is thus reasonable to assume that such a body is intended to be fairly representative of all of the electorate, and responsible and responsive to the county's voters as a whole. See Oden & Meek, County Reapportionment: A Rebuttal, 18 Baylor L. Rev. 15 (1966); compare Davis, *The Implications of Baker* v. *Carr on the County Commissioners Court of Texas*, 17 Baylor L. Rev. 41 (1965).

It cannot fairly be said that residents of the City of Midland have no real concern with the county board's actions, that the board is an essentially administrative body, or that its functions are basically ministerial ones.

Accordingly, it is impossible to accept the Texas Supreme Court's characterization of Commissioners Courts and its conclusion that the election of the commissioners is not governed by *Reynolds* because their legislative duties are "negligible" (R. 145).[73] Moreover, that is not the essence of the decision below. The real basis for the court's refusal to apply the

[73] It was in this context that the Texas court hastily dismissed any reliance on *Reynolds*, stating that the county board's "legislative functions are negligible and county government is not otherwise comparable to the legislature of a state or to the federal Congress where the 'one man, one vote' principle is asserted in its most exacting and compelling sense" (R. 145). What the court had in mind in terming the legislative functions of Texas county boards "negligible" is unclear, since it did not define what it would regard as legislative functions. That court also stated that "[t]he county is a subordinate and derivative branch of state government" (*ibid.*). That local governmental units are subordinate to State legislatures, derive their powers, in the main, from the legislatures, and are not sovereign, in the sense that the States are, are not, however, of constitutional significance in determining what requirements are placed on them by the Equal Protection Clause (see *Sailors* Br. 24–25; 39–40, nn. 43, 44).

equal-population principle[74] is revealed in the following passage from its opinion (R. 148–149):

> The basic problem of Texas counties in the respects under review is the extent of political power which the metropolitan areas should have in relation to the rural areas. * * * The voice of the rural areas will be lost for all practical purposes if the commissioners precincts of counties are apportioned solely on a population basis except, perhaps, in those few sparsely settled counties without a concentration of urban centers. Yet, important affairs of the county administered by the commissioners court—such as roads, bridges, taxable values of large land areas—disproportionately concern the rural areas. Theoretically, the commissioners court is the governing body of the county and the commissioners represent all the residents, both urban and rural, of the county. But developments during the years have greatly narrowed the scope of the functions of the

[74] At one point in its opinion, the Texas Supreme Court quoted at length the language in *Reynolds* rejecting the so-called federal analogy on the ground that political subdivisions, unlike States, were not sovereign entities (R. 145–146, n. 1, quoting from 377 U.S. at 575). For an explanation of the inclusion of this language and the reasons why any reliance thereon in support of the inapplicability of the equal-population principle at the local level is improper, see *Sailors* Br. 34–35, n. 37 (see also note 56, *supra*). Similarly, the Texas court's later apparent reliance (R. 150, n. 2) on *Tedesco* v. *Board of Supervisors of Elections for the Parish of Orleans*, 43 So. 2d 514 (La. Ct. App.), appeal dismissed, 339 U.S. 340, is misplaced, for the reasons developed in our *Sailors* brief (pp. 26–27).

> commissioners court and limited its major responsibilities to the nonurban areas of the county. It has come to pass that the city government with its legislative, executive and judicial branches, is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers.[75]

In part, the court here seems to be espousing the view that rural residents should be favored and urban residents disfavored in the apportionment of seats on Texas county boards in order to achieve some kind of

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[75] Just prior to this quoted language, the Texas court had stated that "[t]he very fact of population concentration enables the city voters to elect county-wide officers," and that "the county commissioners court is not charged with the management and control of all of the county's business affairs [since] the various officials elected by all the voters of the county have spheres that are delegated to them by law and within which the commissioners court may not interfere or usurp" (R. 149). A similar situation of course existed in the State legislative cases, like *Reynolds*, with respect to officials elected Statewide, such as the Governor, Attorney General, and the like. Indeed, it was urged in those cases that this factor should be taken into account and should be accepted as a ground for giving rural areas more legislative representation than they would be entitled to if population alone were considered—since the urban areas had a disproportionate effect in electing Statewide officials, at least in States having urban majorities. The questionable assumptions about urban-bloc voting which this line of argument entails aside, the plain fact is that the Court in *Reynolds* flatly rejected this factor as a relevant one, and indeed made no mention thereof in its lengthy opinion (compare 377 U.S. at 564–568). It would seem, therefore, that the Texas court's suggestion that this factor is of some significance is not well founded.

"balanced" representation.[76] But that view seems foreclosed by *Reynolds* and its companion cases, where it was strenuously urged but rejected. Indeed, in *Reynolds* the Court clearly stated that "[t]he fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote" (377 U.S. at 567; see *id.* at 562–568, 579–580), and in *Davis* v. *Mann,* 377 U.S. 678, 692, the Court explicitly rejected the claim that the apportionment plan there at issue was "sustainable as involving an attempt to balance urban and rural power in the legislature."[77] Nor does the Court's reference in the *Dusch* opinion last Term to "a detente between urban and rural communities" (387 U.S. at 117) indicate that rural overrepresentation at the local governmental level, as distinguished from the State legislative level, is, as a general matter, constitutionally permissible. Rather, that language must be read against the background of the factual situation there presented—consolidation of formerly separate local units (see note 51, *supra,* and generally *supra,* pp. 35–38). In short, insofar as the decision below is grounded on an urban/rural dichotomy, it is wholly inconsistent with this Court's previous determination that such balancing is impermissible in the apportionment context.

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[76] Indeed, the testimony of the present commissioners makes clear that the purpose behind the existing districting arrangement was to ensure perpetuation of rural control of the county board (see note 27, *supra*), and the trial court so found (R. 132).

[77] See also the Court's reference in *Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 656, 674, n. 19, to "the existence of a rural stranglehold on the legislature in Maryland * * *" (see generally *Sailors* Br. 81–82; 90, n. 90).

There is, however, another thread in the Texas Supreme Court's opinion—that Texas county boards do not take actions which importantly affect urban areas, and that it is, for that reason, proper to give the rural areas a more significant voice on these bodies than that to which they would be entitled were population alone considered. But the Texas court itself noted that "[t]heoretically, the commissioners court is the governing body of the county and the commissioners represent all the residents, both urban and rural, of the county" (R. 149). And a mere listing of the powers of the Commissioners Court makes it clear that it does have a substantial impact on the residents of the City of Midland, and that some of its actions do concern and affect them very directly (see the discussion *supra,* pp. 58–60). Of considerable significance, in our view, is the fact that the county board has the statutory power to tax and assess property located in the city, and exercises that power in a most active way. Indeed, under the districting plan now in effect, approximately 61 percent of the assessed valuation of all taxable property is located in Precinct No. 1, which includes all of the city residents.[78] One

[78] In addition, it was alleged that the county board members, "acting as the Board of Equalization of Midland County, have and will continue to value for State and County tax purposes all taxable property in Commissioners' Precincts No. 2, No. 3, and No. 4 at an average of approximately 8% of its fair market value and all taxable property in Commissioners' Precinct No. 1 at an average of approximately 18% of its fair market value" (R. 11).

of the district court's findings was that "taxable values * * * were grossly disproportionate among [the] Commissioners' Precincts" of Midland County (R. 131), and this was implicitly acknowledged by the Texas Supreme Court's inclusion of "taxable values" among the "relevant factors" which it said should be considered in fashioning a revised districting plan (R. 149). In short, in the face of the county board's general powers, and particularly its power to assess and tax all county property, and the fact that this power can be exercised to the serious disadvantage of the city residents, it is difficult to accept the Texas Supreme Court's conclusion that that body's "major responsibilities" are limited "to the nonurban areas of the county" (R. 149).

But the Texas Supreme Court's opinion does raise what might be termed, for want of a better phrase, the overlapping jurisdiction situation. Thus, the court below stated that the "important affairs of the county administered by the commissioners court * * * disproportionately concern the rural areas," and that "the city government with its legislative, executive and judicial branches, is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers" (R. 149). While the Texas court appears to understate significantly the impact of the county board's actions on city residents, the situation it describes is hardly a unique one. Indeed, it is a commonplace of local government in this country for two general-function units

—usually a county and a city—to have jurisdiction which is coincident as to some of the same geographical areas. An aspect of this overlap in authority is that, as a general matter, the cities have municipal government structures which perform certain of the functions which the county governments perform in the unincorporated areas. Conversely, the county governments often do not exercise the full sweep of their powers in the urban areas, because of the existence of municipal governments in those areas. Indeed, since certain problems are unique to urban areas, city councils may have powers which county boards are not generally authorized to exercise.[79] In light of these considerations, it has been asserted that "when governmental functions are divided between two bodies in the same geographical area—county and city—the recognition of such elements as the differing stake of urban and rural citizens may be relevant." [80]

In an overlapping jurisdiction situation, then, it may reasonably be questioned whether county and city

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[79] This is of course a somewhat oversimplified generalization, and account should be taken of the recent move toward urban counties in large metropolitan areas which exercise virtually all the powers of local government and the growth of county home rule in various parts of the country (see generally Final Report of the Commission on Intergovernmental Relations, H. Doc. No. 198, 84th Cong., 1st Sess. 53–54 (1955); Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Colum. L. Rev. 21 (1965); *Sailors* Br. 16–19).

[80] Note, *Reapportionment*, 79 Harv. L. Rev. 1228, 1277 (1966), which further notes "the different degrees of political responsibility a county board may have to its urban and rural constituents" (*ibid.*). See also *Hanlon* v. *Towey*, 142 N.W. 2d 741, 747 (Minn.), and Note, 11 S. Dak. L. Rev. 386, 395 (1966).

residents are similarly situated and "stand in the same relation regardless of where they live" (*Reynolds*, 377 U.S. at 565). Indeed, if there were a practical way of assessing and reflecting the somewhat greater interest of the rural inhabitants in the actions of a county governing board, it would not seem improper to do so. But the fact is that there are no available tools for measuring that difference of degree, nor any rational method of giving it effect (see the discussion *supra*, pp. 55–57). The choice, then, in the overlapping jurisdiction situation, is between giving the city dwellers an equal voice in county affairs—albeit their interest is lesser—or, by holding *Reynolds* inapplicable, allowing them to be deprived of any voice at all.[81] Confronted with these

[81] A like situation was presented in the *Moody* case which the Court decided last Term without reaching the merits (387 U.S. 97; see *supra*, p. 27). There it was argued that the county board's powers—which, though probably less significant, in some respects parallel those of the body here involved—related primarily to the rural areas of the county. There—like here—a populous urban area, with a municipal government structure, was located within the county board's jurisdiction. In *Moody* the disparities from population-based districting were not as extreme as here; there 61 percent resided in one district, here 97 percent are so situated. Here, like in *Moody*, it is clear that "[t] he services performed by the Board are, under the legislation establishing its authority, intended for the benefit of all residents of the county," and "taxes which support such services are paid by all county residents without regard to the district of residence" (*Sailors* Br. 82). In regard to the body involved in *Moody*, Judge Johnson, in his dissenting opinion in that case, stated (256 F. Supp. 195, 201): "These boards of revenue perform important governmental functions, and are designed to be controlled by the voters over which they have jurisdiction. The exercise of their powers, which include the important powers to levy and collect taxes, to spend for a variety of governmental and public purposes, and to establish, change, discontinue, and repair

alternatives, we think it clear that the Equal Protection Clause compels equal representation for all citizens affected.

That is plainly the fairer result, we submit, with respect to general-function units. Indeed, whatever the special responsibilities a county board discharges for the exclusive benefit of the rural inhabitants, it also performs functions which have an important impact on city dwellers as well. This is especially clear where the county government exercises power to tax everyone in the territory, including the residents of the city. That, of course, is the case here. We conclude that so long as the Midland County Commissioners Court performs important governmental functions which significantly affect the city residents—and has a general taxing authority over them—the equal-population principle applies and requires that districting for seats on that body be based on population.[82]

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roads, materially and substantially affects the lives, property, and welfare of the citizens [of the county]."

[82] We took the same position in the *Moody* case last Term, which involved a similar situation (see note 81, *supra*). We there said (*Sailors* Br. 82–83):

"* * * Malapportionment of the county board cannot be justified on the ground that overlapping or additional services are provided by the city—paid for, of course, by the residents of Dothan. There is, of course, no constitutional prohibition on a governmental unit's being organized with sole responsibility and taxing authority outside the city limits of Dothan. But, so long as the Board exercises general authority over the whole county, and taxes accordingly, there is no justification for deviation from population-based districting."

To a somewhat lesser extent, the *Sailors* case also presented an overlapping jurisdiction situation, since both the county school board and the local school districts performed certain functions in regard to education in the same geographical

This result may appear a harsh one in the instant case because the sparsity of population in the rural areas could well result in depriving those who live there of any effective voice if population-based districting is required.[83] Yet, on the other hand, the degree of disparity between the number of rural and urban inhabitants accentuates the unfairness of allowing majority control of the county board to reside in rural hands.[84] But the problem is not unavoidable, as

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area—the county board throughout the county and the local ones within their respective district. No such situation is presented as to county or other local school boards which are the only local governmental bodies performing educational functions in the geographical area within their jurisdiction, however, such as those involved in the *Strickland* and *Delozier* cases (see note 59, *supra*).

[83] Of course, nothing prevents those living in the rural areas from seeking election to the county board from whatever revised districts are prescribed, and it is doubtful that the city dwellers would complain greatly if the rural areas were given one seat on the body, although this would not be in strict accord with the equal-population principle, since then, at least, the rural areas would not have majority control of the board. Perhaps if a body's powers over the overlapped area are plainly insignificant and wholly unimportant, the residents in that area might properly not be taken into account in arranging districts for the election of that body's members. In any event, that is plainly not the situation in Midland County.

[84] Indeed, a significant feature of the instant case is just how egregious the disparities from population-based representation are. A majority—three of the four who are elected—of the commissioners are elected from districts containing less than three percent of the people and voters; the remaining 97 percent are represented by a single commissioner. And, under the districting plan currently in effect, the maximum population-variance ratio is approximately 164 to 1 (see R. 8). Certainly such figures are rougher and less meaningful, because of the small size of the bodies involved at the local level, than in the State legislative cases (see *Sailors* Br. 62). But there is no blinking the fact that, under any sensible test, the county board is grossly malapportioned.

alternatives, we think it clear that the Equal Protection Clause compels equal representation for all citizens affected.

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"* * * Malapportionment of the county board cannot be justified on the ground that overlapping or additional services are provided by the city—paid for, of course, by the residents of Dothan. There is, of course, no constitutional prohibition on a governmental unit's being organized with sole responsibility and taxing authority outside the city limits of Dothan. But, so long as the Board exercises general authority over the whole county, and taxes accordingly, there is no justification for deviation from population-based districting."

To a somewhat lesser extent, the *Sailors* case also presented an overlapping jurisdiction situation, since both the county school board and the local school districts performed certain functions in regard to education in the same geographical

This result may appear a harsh one in the instant case because the sparsity of population in the rural areas could well result in depriving those who live there of any effective voice if population-based districting is required.[83] Yet, on the other hand, the degree of disparity between the number of rural and urban inhabitants accentuates the unfairness of allowing majority control of the county board to reside in rural hands.[84] But the problem is not unavoidable, as

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area—the county board throughout the county and the local ones within their respective district. No such situation is presented as to county or other local school boards which are the only local governmental bodies performing educational functions in the geographical area within their jurisdiction, however, such as those involved in the *Strickland* and *Delozier* cases (see note 59, *supra*).

[83] Of course, nothing prevents those living in the rural areas from seeking election to the county board from whatever revised districts are prescribed, and it is doubtful that the city dwellers would complain greatly if the rural areas were given one seat on the body, although this would not be in strict accord with the equal-population principle, since then, at least, the rural areas would not have majority control of the board. Perhaps if a body's powers over the overlapped area are plainly insignificant and wholly unimportant, the residents in that area might properly not be taken into account in arranging districts for the election of that body's members. In any event, that is plainly not the situation in Midland County.

[84] Indeed, a significant feature of the instant case is just how egregious the disparities from population-based representation are. A majority—three of the four who are elected—of the commissioners are elected from districts containing less than three percent of the people and voters; the remaining 97 percent are represented by a single commissioner. And, under the districting plan currently in effect, the maximum population-variance ratio is approximately 164 to 1 (see R. 8). Certainly such figures are rougher and less meaningful, because of the small size of the bodies involved at the local level, than in the State legislative cases (see *Sailors* Br. 62). But there is no blinking the fact that, under any sensible test, the county board is grossly malapportioned.

a political matter. Indeed, if it seems incongruous to have the city dwellers—who have their own municipal body—dominating a county government with primarily rural functions, that may argue for eliminating the overlap by a partial or total division of jurisdiction (see note 82, *supra*). Perhaps the Midland County Commissioners Court could be relieved of all powers over the city residents—in which event it could remain under the control of the rural inhabitants. But since the county board presently has the power to affect importantly the lives of the residents of the City of Midland, they are entitled to equal representation on that body.[85] Thus, the Texas Supreme Court's determination that the equal-population prin-

[85] We recognize that the Texas Supreme Court found the existing districting scheme arbitrary and lacking a rational basis. But that determination was grounded basically on State constitutional grounds (see *supra*, pp. 14–15), and its decision does not substantially remedy the existing malapportionment. Thus, the Texas court expressly sanctioned "a rational variance from equality in population" among the districts based on "additional relevant factors such as number of qualified voters, land areas, geography, miles of county roads and taxable values" (R. 149–150). A similar approach was urged to the Court in the State legislative cases—at least as to the relevance of "land areas" and "geography"—and it is beyond doubt that such factors were found irrelevant by the Court in *Reynolds* (see 377 U.S. at 562–580). With respect to the "number of qualified voters" factor, the percentage of the county's qualified voters residing in the disfavored Precinct No. 1 has consistently been slightly higher than the percentage of the county's population residing there—both in excess of 97 percent (see R. 7–9). As to "taxable values," approximately 61 percent of the assessed valuations of taxable property is located in Precinct No. 1, although the residents of that area elect only one of the four county commissioners.

ciple of *Reynolds* is inapplicable is, in our view, an erroneous one and requires reversal by this Court.

Several other matters deserve brief comment. Considerable concern was expressed at the oral argument last Term about the large number of bodies potentially affected by a holding that *Reynolds* applies at the local governmental level, and about the volume of litigation which might ensue from such a decision. The relevance of that consideration aside, we reiterate our belief that the problem is judicially manageable (see *Sailors* Br. 107–116). Indeed, the decisions last Term in *Moody* and *Bianchi* contribute to that end since, under the Court's narrow reading of 28 U.S.C. 2281 in those cases, three-judge courts will not be convened, as a general matter, in local government apportionment cases, and direct appeals to this Court will be infrequent (see *Sailors* Br. 113–116), thus promoting economy in the federal judicial system.

We also recognize the concern expressed by the Court in the *Sailors* and *Dusch* opinions with maintaining flexibility and opportunity for experimentation in governmental organization at the local level (387 U.S. at 109–111, 117). But innovation will not be stifled if *Reynolds* is applied at the local level; on the contrary, such a holding may even stimulate new developments, albeit within a proper constitutional framework. What is more, most of the existing districting arrangements at the local level which are not grounded on population are hardly the product of in-

novation or experimentation. Rather, they have resulted from a concerted effort to resist change—to maintain the *status quo*—against pressures for adjustment to reflect new and different conditions and circumstances. It would be a cruel irony to preserve them in the hope that change may someday come.

A veritable groundswell of litigation on the constitutional question here at issue amply demonstrates that the constitutional rights sought to be effectuated are important ones. Sound policy considerations support the resolution the government urges (see *Sailors* Br. 63–72). A holding that the equal-population principle applies at the local level will avoid seriously limiting the reach and import of *Reynolds,* and will avert the creation of a constitutional anomaly of considerable proportions.[86] What is sought here is a decision taking the final step in the process begun with *Baker* v. *Carr*. As a practical matter, that step is an important one; as a constitutional matter, it is not a large one. In the government's view, it is one which, at all events, the Court should take.[87]

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[86] Of course, a contrary holding will also undercut those progressive State courts which have applied *Reynolds* in a logical manner without waiting for explicit direction from this Court (see note 37, *supra;* see also *Sailors* Br. 61).

[87] No question relating to the propriety of proportional representation schemes is involved in the instant case; nor does the government view the position we urge—a holding that the equal-population principle of *Reynolds* applies generally to local governmental bodies—as precluding the consideration, in an appropriate case, of whether certain such arrangements are consistent with the principles laid down in *Reynolds* and related cases (see, *e.g.*, *People ex rel. Engle* v. *Kerner*, 205 N.E. 2d 33, 35 (Ill.), cited with approval in *Scott* v. *Germano*, 381 U.S. 407, 408–409; *Blaikie* v. *Power*, 193 N.E. 2d 55 (N.Y. Ct. App.),

CONCLUSION

For the reasons stated, the judgment of the Texas Supreme Court should be reversed and the cause remanded with directions to reinstate the judgment and order of the district court.

Respectfully submitted.

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appeal dismissed, 375 U.S. 439). Nor is there any need here to consider the propriety of weighted voting (see *Sailors* Br. 79–80), or remedial devices generally; as stated in our *Sailors* brief (pp. 116–118), the approach outlined in *Reynolds* and later decisions in regard to questions of relief in apportionment cases provides a workable framework in this regard and applies equally to local governmental as well as State legislative cases.

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